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RETIREMENT AND WORKER CHOICE: INCENTIVES TO RETIRE AND THE AGE DISCRIMINATION IN EMPLOYMENT ACT†

Judith A. McMorro*^{*}

Most persons, whether corporate executives, factory workers, or law professors, are part of a complex work structure in which they have the status of "employee." During their term of employment, most employees work either directly or indirectly toward the goal of eventual independence from the work relationship through retirement. As the values attached to the role of work in a person's life change, many employees seek to achieve the goal of retirement before the traditional retirement age of 65. Other persons hope to prolong retirement to well beyond the age of 65. Employers also face a complex and rapidly changing world of shifting demographics, new technology requiring fewer specialized skilled workers, and wage structures that may pay new workers less than long-term workers. These changes may encourage employers to sever the employment relationship with older workers, largely through various early retirement programs.

Retirement, however, takes place against a backdrop of statutory law that prohibits discrimination on the basis of age. The Age Discrimination in Employment Act (ADEA or Act)¹ protects employees age 40 or older and makes it unlawful for an employer to discriminate against any person with regard to that individual's terms or conditions of employment because of age.² Because retirement is usually triggered by reaching a

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* Assistant Professor of Law, Boston College Law School. I would like to thank Denis Brion, Mark Brodin, James Holzhauer, James Repetti, Robert Smith, and Paul Tremblay for their helpful comments on earlier drafts of this article. I would also like to thank Mary Deck, Judith Fitzgerald, and Martha Zackin for their invaluable research assistance, and Boston College for providing a research grant.

¹ 29 U.S.C. §§ 621-34 (1982 & Supp. III 1985) as amended by Act of Oct. 31, 1986, Pub. L. No. 99-592, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 3342 (to be codified at 29 U.S.C. § 631(a)). The Age Discrimination in Employment Act of 1967 prohibits discrimination on the basis of age in the hiring, promotion, and discharge of employees between the ages of 40 and 65. 29 U.S.C. §§ 623, 631 (1976) (amended 1978, 1982, 1984, 1986). In 1978, Congress amended the ADEA expressly to prohibit involuntary retirement. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 2(a), 92 Stat. 189, 189 (1978) (codified as amended at 29 U.S.C. § 623(f)(2)(1982)). The 1978 Amendments also raised the ADEA's upper age limit from 65 to 70. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 12, 92 Stat. 189, 189 (1978) (codified as amended at 29 U.S.C. § 631 (1982)). In October 1986 Congress eliminated the upper cap under the ADEA. Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 3342 (to be codified at 29 U.S.C. § 631(a)).

The Act exempts high level executives over the age of 65 who will receive more than \$44,000 in nonforfeitable annual retirement benefits. 29 U.S.C.A. § 631(c)(1) (West Supp. 1987).

² 29 U.S.C. § 631(a)(1) (1982).

During the debates on the Civil Rights Act of 1964, age was considered as one form of employment discrimination to be included under Title VII. See Freed & Dowell, *The Age of Discrimination in Employment Act of 1967*, 6 CLEARINGHOUSE REV. 196, 196 (1972). In lieu of incorporating age into Title VII, § 715 of the Civil Rights Act of 1964 directs the Secretary of Labor to "make a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals

specified age, retirement distinguishes among employees because of age. Under the ADEA's broad prohibition against discrimination, most retirement plans would be automatically suspect under the Act because they exclude some employees over 40.

To balance the prohibition against discrimination with retirement, the ADEA expressly addresses two issues involving retirement. Section 4(f)(2) of the ADEA permits employers to offer "bona fide" retirement plans so long as they are "not a subterfuge to evade the purposes of" the Act.³ Section 4(f)(2) also expressly provides, however, that no plan can require the involuntary retirement of employees.⁴ Between these two possibilities — passive adherence to a bona fide retirement plan and involuntary retirement — lies a wide range of employer conduct that the ADEA does not expressly address. The ADEA fails to clarify when, if ever, an employer's actions to encourage retirement will constitute age discrimination.

This Article develops an analysis based upon the fundamental legislative purpose underlying the ADEA: Congress enacted the ADEA to increase the range of choices available to older employees. In light of the Act's language, structure, and legislative history, as well as the current social context of retirement, it is evident that Congress enacted the ADEA not just to eliminate arbitrary age discrimination against older workers, but also to protect older employees' distinct expectations in leaving the job market through retirement.⁵ Congress also was aware that through sophisticated techniques employers can transform an option to retire into a command to retire.⁶ Consistent with the Act's goals, courts should interpret the ADEA to allow employers to enlarge the choices available to employees but should prohibit employers from acting in ways that make the choice illusory or structuring benefits in a manner that acts as a subterfuge for age discrimination.

The tension between retirement and age discrimination is best exemplified by employers' increasing use of special retirement incentives.⁷ Such incentives offer more than

affected." Civil Rights Act of 1964, Pub. L. 88-352, § 715, 78 Stat. 241, 265 (1964). The Act directed the Secretary to make a report, including "such recommendations for legislation to prevent arbitrary discrimination in employment because of age . . ." *Id.* The secretary presented the Study to Congress on June 30, 1965. U.S. DEPARTMENT OF LABOR, REPORT TO THE CONGRESS ON AGE DISCRIMINATION IN EMPLOYMENT UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964 (1965). Based in part on the Secretary of Labor's finding of wide-spread discrimination, Congress enacted the ADEA. See H.R. REP. NO. 805, 90th Cong., 1st. Sess., reprinted in 1967 U.S. CODE CONG. & ADMIN. NEWS 2213, 2214. [hereinafter H.R. REP. NO. 805] The ADEA, as the end product of swift congressional action, represents a legislative compromise: the substantive proscriptions of the ADEA parallel Title VII while the procedural requisites incorporate the Fair Labor Standards Act. Compare 29 U.S.C. § 623(a) (1982) (ADEA prohibitions) with 42 U.S.C. § 2000e-2(a) (Title VII prohibitions); 29 U.S.C. § 626 (states that the ADEA shall be enforced in accordance with the "powers, remedies, and procedures" of fair labor standards). See also H.R. REP. NO. 805, *supra*, at 2214-15; Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (December 15, 1967) (President Johnson recommended ADEA on January 23, 1967; Congress considered and passed the Act in December 1967).

³ 29 U.S.C. § 623(f)(2) (1982).

⁴ *Id.*

⁵ As discussed extensively in Section III of this Article, not all options that enhance choice are lawful under the ADEA.

⁶ See 29 U.S.C. § 623(f)(2) (1982) (plans must be "bona fide" and "not a subterfuge").

⁷ A SURVEY OF RETIREMENT, THRIFT AND PROFIT-SHARING PLANS COVERING SALARIED EMPLOYEES AT 50 LARGE U.S. INDUSTRIAL COMPANIES AS OF JANUARY 1, 1987, 9 (Wyatt Co. 1987) (of the fifty largest U.S. industrial companies, sixteen offered special early retirement incentives in 1986; thirty

the terms of an existing pension plan in order to encourage employees to retire. For example, a retirement incentive may for a limited period give employees otherwise eligible to retire an additional cash bonus if they retire, or may change pension rules to allow certain classes of employees to retire at an earlier age, or after fewer years of service. These special incentives generally are designed to achieve a specific short-term management goal, such as an immediate reduction in the workforce. Consequently, such offers are generally available for only a short period of time, usually thirty to ninety days,⁸ and are often targeted to specific groups of employees.⁹ In addition, when a business slump has motivated the retirement incentive program, older employees face the same uncertain future that all employees face: they may be subject to a job elimination program. Unlike most pension plans, employees do not have the benefit of knowing that a retirement incentive turned down today will be available at some later date. In addition, unlike regular pension plans, such special incentives are generally not the result of management-labor discussions but are a purely management motivated decision.¹⁰

These special retirement incentives have spawned several lawsuits in which courts have attempted to articulate the line between permissible and impermissible encouragement to retire under the ADEA.¹¹ Employees have sued because they were included in an incentive plan and accepted, later arguing that their acceptance was not voluntary.¹² These "included employees" have argued that such retirement incentive plans are inherently suspect and consequently never can result in voluntary retirement.¹³ Alternatively, they have argued that the manner of implementing the plan in particular cases made it involuntary and therefore unlawful under the ADEA.¹⁴ Other employees have challenged retirement incentive plans because they were *not* included in the incentive plan and wished to be. Such "excluded employees" claim that they have been deprived

companies offered early retirement incentives during the last 10 years; and fifteen companies offered more than one retirement incentive program).

⁸ *Id.* (of the thirty companies that have offered an early retirement window, twenty reported a window or offer period of one to three months; ten companies reported a two-month offer period; the longest window was three years, and the shortest was one day).

⁹ *Id.* (nine companies reported that the early retirement incentive was limited to employees in specific divisions or designated work areas).

¹⁰ See, e.g., *Trenton v. Scott Paper Co.*, 832 F.2d 806, 809 (3d Cir. 1987).

¹¹ See *infra* notes 13, 15, and 16. See also *Karlen v. City Colleges of Chicago*, 837 F.2d 314, 317 (7th Cir. 1988) ("The question of the proper treatment of early-retirement programs is the most difficult question under the Age Discrimination in Employment Act.").

¹² See *infra* note 13.

¹³ See, e.g., *Paolillo v. Dresser Indus., Inc.*, 43 Fair Empl. Prac. Cas. (BNA) 338, *withdrawn and substituted on rehearing*, 821 F.2d 81 (2d Cir. 1987). The Second Circuit recently found that offering an incentive retirement program constitutes a *prima facie* ADEA violation. The panel held that such programs are facially suspect and proper only if the employer proves under § 4(f)(2) that the incentive plan was both bona fide and not a subterfuge to evade the ADEA. 43 Fair Empl. Prac. Cas. (BNA) at 341. The panel, however, quickly withdrew its original opinion and issued a new opinion which found only that the plan as implemented raised a factual question as to voluntariness. 821 F.2d at 84. The Seventh Circuit, directly disapproving of the original Second Circuit panel decision, has given judicial imprimatur to incentive retirement programs, finding them facially valid and holding that they do not require justification under § 4(f)(2) of the ADEA. *Henn v. National Geographic Soc'y*, 819 F.2d 824, 827 (7th Cir. 1987). See *infra* notes 140-48 and accompanying text for a discussion of the *prima facie* case under ADEA.

¹⁴ See *infra* notes 154-86 and accompanying text for a discussion of plan implementation methods which may render the plan involuntary.

of an employment benefit because of their age in violation of the ADEA.¹⁵ In yet a third category of challenges, employees have sued claiming that the retirement incentives were not sufficiently generous to the older eligible employees or were structured to financially penalize older workers who refused the incentive.¹⁶ In these cases the employees are not claiming that retirement incentive plans are inherently suspect, but rather that they must meet certain requirements in order to be free from claims of age discrimination.

The courts face a difficult task in articulating when an employer's conduct to encourage retirement violates the ADEA. The ADEA unfortunately fails to define much of its language and the Equal Employment Opportunity Commission (EEOC), which is charged with enforcing the ADEA,¹⁷ has been slow to clarify the Act's meaning.¹⁸ As a result, the courts have come to conflicting decisions concerning the proper interpretation of the ADEA.¹⁹ These cases clearly demonstrate the tension between protecting employees from age discrimination, often through paternalistic but socially beneficial statutory prohibitions, and the powerful attraction of voluntary retirement.

Once it is recognized that Congress enacted the ADEA in order to protect older workers' range of options, the distinction between lawful and unlawful conduct becomes clearer. Employees who are included in retirement incentive programs that equally encourage all eligible employees have had their options enhanced. As long as the option to retire is voluntary, these employees have not been discriminated against in violation of the ADEA. Consequently, employees who claim discrimination solely because they are included in an early retirement program should bear the burden of proving absence of voluntariness in order to establish an ADEA violation.²⁰ In contrast, employees who are excluded because of their age have not had the benefit of enhanced choice and have not been accorded the same terms and conditions of employment as other employees. Similarly, employees included in incentive plans but offered less favorable terms because of age also have not received equal treatment. Both types of employees can demonstrate a *prima facie* case of age discrimination by showing that age was the reason for either exclusion or less generous benefits. If age is the basis for either exclusion or less generous benefits, the employer can avoid ADEA liability only by demonstrating that the plan falls within section 4(f)(2), which protects bona fide employee benefit plans that are not a subterfuge to evade the purpose of the Act.²¹

¹⁵ See, e.g., *Cipriano v. Board of Educ., N. Tonawanda*, 785 F.2d 51, 58 (2d Cir. 1986) (employer must show a "legitimate business reason" under § 4(f)(2) for excluding employees); *Patterson v. Independent School District No. 709*, 742 F.2d 465, (8th Cir. 1984) (exclusion of older employee from retirement incentive plan compatible with § 4(f)(2); no cost or business justification required). See also *Trenton v. Scott Paper Co.*, 832 F.2d 806 (3d Cir. 1987) (plaintiffs excluded from incentive retirement plan because of their work locations, not age).

¹⁶ See, e.g., *Karlen v. City Colleges of Chicago*, 837 F.2d 314 (7th Cir. 1988); *Dorsch v. L.B. Foster Co.*, 782 F.2d 1421 (7th Cir. 1986); *Britt v. EI DuPont de Nemours & Co., Inc.*, 768 F.2d 593 (4th Cir. 1985).

¹⁷ Originally, Congress gave responsibility for enforcing the ADEA to the Department of Labor. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, §§ 6-7, 81 Stat. 602, 604-05 (1967). In 1979 Congress transferred these responsibilities to the EEOC. Reorg. Plan No. 1 of 1978, § 92 Stat. 3781, 3781 (1978) *codified at* 5 U.S.C. app., § 1155 (1982).

¹⁸ See *infra* note 233.

¹⁹ See *supra* notes 13 and 19.

²⁰ See *infra* notes 149-53.

²¹ Readers familiar with both the ADEA and mandatory retirement under the ADEA may wish to begin reading at I.C., *infra* at note 60.

Section I of this Article examines the ADEA's language²² and legislative history²³ concerning retirement and demonstrates that Congress intended to structure the ADEA to enhance employees' choices. Section II examines the use of retirement incentives and, in light of the role of retirement in the lives of American workers²⁴ and the benefits that can flow from voluntary retirement, demonstrates why such incentives should not be presumptively unlawful.²⁵ Finally, Section III contrasts ADEA claims raised by included and excluded employees, and demonstrates how courts can use the doctrine of constructive discharge and section 4(f)(2)'s exceptions to strike the proper balance between the interests of employers and employees.²⁶

I. THE STATUTE'S LANGUAGE AND LEGISLATIVE HISTORY

A. *The Language*

The ADEA's stated goals are "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment."²⁷ The Act's first goal, which requires treatment based on ability, describes a policy of age blindness. The second goal, prohibiting arbitrary age discrimination, and the third goal, helping employers and workers find ways to meet problems arising from the impact of age on employment, however, indicate that Congress acknowledges the distinctions that arise among workers because of age.²⁸ Unfortunately, the ADEA fails to articulate precisely what constitutes "discrimination" or "arbitrary" discrimination, or what "problems" exist because of the impact of age on employment.²⁹

The ADEA's prohibitions begin to clarify these legislative goals. The Act's express prohibitions are designed to implement the first two purposes: to ensure that older employees are judged on ability, and to prohibit "arbitrary age discrimination." The ADEA makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's age."³⁰ The Act also makes it unlawful for an employer "to limit, segregate, or classify his [or her] employees in any way which would deprive or tend to deprive any

²² See *infra* notes 27–52 and accompanying text.

²³ See *infra* notes 53–92 and accompanying text.

²⁴ See *infra* notes 94–103 and accompanying text.

²⁵ See *infra* notes 94–139 and accompanying text.

²⁶ See *infra* notes 140–86 and accompanying text.

²⁷ 29 U.S.C. § 621(b) (1982).

²⁸ See Minow, *The Supreme Court 1986 Term — Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987) (describing how unstated assumptions about whose point of view will be the point of reference allow for appearance of objectivity; points out some judicial efforts to recognize and appreciate a perspective not that of the decisionmaker).

²⁹ Although Title VII has a lengthy definition section, it also fails to define "discrimination." 42 U.S.C. § 2000e (1982); see Bayer, *Mutable Characteristics and the Definition of Discrimination Under Title VII*, 20 U.C. DAVIS L. REV. 769, 774–95 (1987) (discussing definition of "discrimination" under Title VII). The ADEA's broad prohibition of "arbitrary age discrimination" presumably would outlaw any age distinctions used for any purposes, except where the conduct was deemed "not arbitrary."

³⁰ 29 U.S.C. § 623(a)(1) (1982).

individual of employment opportunities . . . because of such individual's age."³¹ The conduct prohibited by the ADEA is, in essence, a definition of discrimination.

Congress also articulated what constitutes "arbitrary age discrimination" by the manner in which it structured the class of employees the ADEA protects and through exceptions to the Act. Congress designated persons between the ages of 40 and 65 (with the upper cap later raised to 70 and eliminated altogether in 1986) as the protected class, rather than impose a general prohibition of age discrimination for all ages.³² The legislative history demonstrates that Congress was well aware that by limiting the protected class the ADEA did not outlaw some very obvious age-discriminatory practices, such as mandatory retirement of stewardesses who reached the age of 32.³³

By defining the protected class as employees between the ages of 40 and 65, Congress was obviously unwilling to prohibit all age-based restrictions in employment. The reason is self-evident. Age is a common and pervasive criterion for eligibility for benefits and burdens that accrue in our society. The right to work,³⁴ drink,³⁵ vote,³⁶ and the right or obligation to serve in the armed forces³⁷ are all triggered by reaching a certain age. Certain social security and welfare benefits flow directly because of the recipient's young age.³⁸ Similarly, many benefits are triggered by advanced age, the most obvious being Social Security.³⁹ In addition, over one hundred other federal programs and an undetermined number of state and local programs provide direct benefits to the elderly.⁴⁰

Many of these age-based benefits are tied to employment, such as the minimum work age and social security eligibility. These statutes recognize that age distinctions are not always arbitrary because the needs of individuals may vary according to their age.⁴¹ Although many such classifications may be based on stereotypes, Congress was unwilling to state that all age-based restrictions in employment are improper.⁴²

³¹ *Id.* § 623(a)(2). The ADEA also prohibits discrimination by employment agencies and labor unions. *Id.* § 623(b)-(c) (1982).

³² See *supra* note 1 for discussion of the various amendments that raised the age of individuals protected under ADEA.

³³ See H.R. REP. NO. 805, *supra* note 2, at 2219.

³⁴ See, e.g., 29 U.S.C. §§ 203(l), 212, 213(c) (1982) (child labor laws).

³⁵ See, e.g., 23 U.S.C. § 158 (Supp. III 1985) (withholding federal highway funds from states that allow individuals under twenty-one years of age to purchase alcoholic beverages).

³⁶ U.S. CONST. amend. XXVI, § 1 ("The rights of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.").

³⁷ See, e.g., 10 U.S.C. § 519 (1982) (allowing temporary enlistment in war time of individuals at least eighteen years of age).

³⁸ See, e.g., 42 U.S.C. §§ 607, 672 (1982 & Supp. III 1985) (providing benefits and foster care to dependent children of unemployed parents).

³⁹ See *id.* § 402 (1982 & Supp. III 1985).

⁴⁰ Pepper, *Foreward*, 32 HASTINGS L.J. 1099, 1099 (1981). Many local governments provide discounts for public transportation, food, and other benefits to the elderly. See, e.g., MASS. GEN. LAWS ANN. ch. 161A, § 5 (West 1976) (Transportation Authority shall charge persons aged 65 and older half the regular adult cash fare); MASS. GEN. LAWS ANN. ch. 15 § 1 (West 1981) (school committee may extend the school lunch period in order to serve lunch to authorized elderly persons aged 65 and older).

⁴¹ See, e.g., *New York v. Ferber*, 458 U.S. 747, 757 (1982) (upholding constitutionality of statute prohibiting persons from knowingly promoting a sexual performance of a child under the age of 16) (*citing* *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982) (recognizing that a state has a compelling interest in safeguarding the physical and psychological interests of minors)).

⁴² See H.R. REP. NO. 805, *supra* note 2, at 2219. For example, the House Report notes that

By defining the protected class as those employees between the ages of 40 and 65,⁴³ Congress identified the employees it deemed most subject to arbitrary age discrimination and who suffered the most serious consequences.⁴⁴ By protecting only these employees, Congress also recognized that the ADEA is directed primarily at the employment problems of *older* workers.⁴⁵ Unfairness imposed in the name of age discrimination against those in the unprotected group, such as mandatory retirement for stewardesses at the age of 32 or allowing age discrimination after 65, was tolerated in the initial drafting of the ADEA because of the complexity of problems that a global prohibition might raise.⁴⁶ Through subsequent amendments to the ADEA Congress eventually lifted the upper age cap.⁴⁷ The protected class is now defined as employees over the age of 40.⁴⁸

some industries, such as railroads, have a disproportionately high number of older workers and that the ADEA is not intended "to prevent an employer from achieving a reasonable age balance in his [or her] employment structure." *Id.* It is difficult to reconcile this language with the ADEA's express prohibitions. See 29 U.S.C. § 623 (1982). In any event, that must be left to another article. See also H.R. REP. NO. 805, *supra* note 2, at 2220 ("[t]oo many different types of situations in employment occur for the strict application of general prohibitions and provisions").

For a comprehensive examination of age discrimination against adults, see I-3 H. EGLIT, *AGE DISCRIMINATION* (1987). As Professor Eglit notes, although age distinctions are common in our society, they are not necessarily appropriate in all circumstances. *Id.* at § 1.01. The House Report accompanying the 1967 Act states that the bill's purpose is "to promote the employment of older workers based on their ability." This will be achieved by assisting "employers and employees in meeting employment problems which are real and dispelling those which are illusory . . ." H.R. REP. NO. 805, *supra* note 2, at 2214.

⁴³ 29 U.S.C. § 631 (1976) (amended 1978, 1982, 1984, 1986). Because growing old is a process, defining "age" is extremely difficult. See J. LEVIN & W. LEVIN, *Ageism: Prejudice and Discrimination Against the Elderly* 71 (1980) ("A person is old in our society when he or she is defined as such by the dominant forces in society."). Congress necessarily had to define the protected class, short of stating that age would always be an improper basis for allocating work benefits. To "define" the protected class could require either designating both an upper and lower limit, as Congress initially did in 1967, or to set only an upper or only a lower limit. In 1986, Congress lifted the upper cap in the ADEA, thereby defining the protected class as anyone over age 40. See *Age Discrimination in Employment Amendments of 1986*, Pub. L. No. 99-592, 1986 U.S. CODE CONG. ADMIN. NEWS (100 Stat.) 3342 (to be codified at 29 U.S.C. § 631(a)).

⁴⁴ H.R. REP. NO. 805, *supra* note 2, at 2219 (age 40 was selected because "testimony indicated this to be the age at which age discrimination in employment becomes evident"). Age 40 was also the lower age limit used in most state statutes. *Id.*

⁴⁵ *Id.* ("Although the committee recognized the significance of the problem, it was felt a further lowering of the age limit proscribed by the bill would lessen the primary objective; that is, the promotion of employment opportunities for older workers.").

⁴⁶ See *id.*

⁴⁷ In the 1967 Act, Congress directed the Department of Labor to examine the possibility of raising the ADEA's upper cap, which was done in 1978 to extend protection to workers up to age 70. *Age Discrimination in Employment Act Amendments of 1978*, Pub. L. No. 95-256, § 12, 92 Stat. 189, 189 (1978) (codified as amended at 29 U.S.C. § 631 (1982)). In the 1978 Act, Congress directed the Department of Labor to examine the possibility of lifting the upper cap altogether, which was done in 1986. *Id.* at § 2(a); *Age Discrimination in Employment Act Amendments of 1986*, Pub. L. No. 99-592, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 3342 (to be codified at 29 U.S.C. § 631(a)). The incremental protections under the ADEA provide an interesting example of "policy creeping," a topic far beyond the scope of this Article.

⁴⁸ *Age Discrimination in Employment Act Amendments of 1986*, Pub. L. No. 99-592, 1986, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 3342 (to be codified at 29 U.S.C. § 631(a)). No similar legislative effort has been undertaken to lower the ADEA's protected age class. The appropriateness of defining the class in this manner is not discussed expressly in this Article.

Congress also attempted to separate lawful discrimination from "arbitrary" discrimination through several express exceptions to the ADEA. The Act makes clear that employment decisions based on good cause or on reasonable factors other than age are not prohibited, even if the employee falls within the protected class.⁴⁹ The ADEA contains two exceptions that address instances in which an employer admits that it acted because of an employee's age, but claims that some statutory protection excuses that discrimination. First, an employer may make age distinctions "where age is a bona fide occupational qualification (BFOQ)."⁵⁰ The second, and most significant, exception is found in section 4(f)(2) of the ADEA:

(1) It shall not be unlawful for an employer, employment agency, or labor organization —

(2) to observe the terms of a *bona fide seniority system* or any *bona fide employee benefit plan* such as a retirement, pension, or insurance plan, which is *not a subterfuge to evade the purposes of this chapter*, except that no such employee benefit plan shall excuse the failure to hire any individual, and *no such seniority system or employee benefit plan shall require or permit the involuntary retirement of an individual* specified by section 631(a) of this title because of the age of such individual.⁵¹

By including these exceptions Congress has indicated that in its view differential treatment that fits these statutory exceptions is not "arbitrary."

Section 4(f)(2) is critical to the ADEA because a significant employee benefit — retirement — is made available based on age. Under the language quoted above, it would be arbitrary discrimination for an employer to require "involuntary" retirement but it would not be arbitrary discrimination to observe the terms of a bona fide retirement plan that was not a subterfuge to evade the ADEA. Through this balance of interests section 4(f)(2) addresses, at least in part, the reality that more older, rather than younger, employees will have both the interest and financial means to retire from the job market.

⁴⁹ 29 U.S.C. § 623(f)(3) (1982). The ADEA provides that "[i]t shall not be unlawful" for an employer to "discharge or otherwise discipline an individual for good cause." *Id.* See Comment, *Coming of Age: Unique and Independent Treatment of the ADEA*, 7 AM. J. TRIAL ADVOC. 583, 585-86 (1984) (ADEA provides a good cause exception, unlike Title VII). The ADEA also provides that it shall not be unlawful to take employment action "where the differentiation is based on reasonable factors other than age" (RFOA). 29 U.S.C. § 623(f)(1) (1982). The "good cause" and RFOA provisions often are used interchangeably as defenses. See *Kelly v. American Standard, Inc.*, 640 F.2d 974, 985 (9th Cir. 1981); *Marshall v. Westinghouse Elec. Corp.*, 576 F.2d 588, 591 (5th Cir. 1978); Lake, *Substantive Requirements Under the ADEA*, in ADEA: A SYMPOSIUM HANDBOOK FOR LAWYERS AND PERSONNEL PRACTITIONERS 28, 50 (1983). Courts have disagreed about whether these exceptions are pure affirmative defenses or whether they should be treated as part of the plaintiff's burden of proof by shifting the burden of persuasion back to the plaintiff after the defendant has articulated a legitimate, nondiscriminatory reason for its action. Eglit, *The Age Discrimination in Employment Act's Forgotten Affirmative Defense: The Reasonable Factors Other Than Age Exception*, 66 B.U.L. REV. 155, 159-60 (1986); *Marshall*, 576 F.2d at 591. See also 29 C.F.R. § 1624.7(b) (1987).

⁵⁰ 29 U.S.C. § 623(f)(1). Cf. 42 U.S.C. § 2000e-2(e). The employer usually concedes that age was a factor in the employment decision, but argues that it was a necessary factor because of the absence of effective alternative methods to achieve legitimate goals. See, e.g., *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985); *Smallwood v. United Air Lines, Inc.*, 661 F.2d 303 (4th Cir. 1981); *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975); Lake, *supra* note 49, at 37-44 (1983).

⁵¹ 29 U.S.C. § 623(f)(2) (1982) (emphasis added). See *infra* § 1.B. for a discussion of the history of § 4(f)(2).

The language quoted above, however, did not appear in that form in the original ADEA passed in 1967. The legislative history of the later changes in section 4(f)(2) helps clarify the meaning of arbitrary age discrimination when retirement is involved.⁵²

B. *The Legislative History and Mandatory Retirement*

The ADEA has not always expressly prohibited mandatory retirement. When the ADEA became law in 1967, section 4(f)(2) did not contain the caveat that no plan "shall require or permit the involuntary retirement of an individual."⁵³ The ambiguity and apparent breadth of the original section 4(f)(2), along with the caveat that it does not apply to hiring, caused some courts to conclude that if Congress had intended to prohibit mandatory retirement, it would have said so expressly in section 4(f)(2).⁵⁴ Under this interpretation, employers lawfully could force older employees to retire without regard to whether the individual employee wished to remain employed and without regard to an employee's ability to perform his or her job.

Because lower courts reached divergent interpretations⁵⁵ the United States Supreme Court considered the issue in *United Airlines v. McMann*.⁵⁶ In *McMann*, the Supreme Court held that mandatory retirement within the protected class was permitted under section 4(f)(2), at least if such retirement occurred pursuant to a plan that was established before the ADEA's passage.⁵⁷ *McMann's* effect was short-lived because Congress was simultaneously considering, and subsequently passed, legislation to prohibit expressly involuntary retirement because of age.⁵⁸

⁵² For more background on the ADEA see H. EGLIT, *supra* note 42; Sholl & Strang, *Age Discrimination and the Modern Reduction in Force*, 69 MAR. L. REV. 331 (1986).

⁵³ As originally enacted, § 4(f)(2) read as follows:

(f) It shall not be unlawful for an employer, employment agency, or labor organization

— . . .

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual.

29 U.S.C. § 623(f)(2) (1976) (*amended by Age Discrimination in Employment Act Amendments of 1978*, Pub. L. No. 95-256, § 2(a), 92 Stat. 189, 189 (1978)). Employees not covered by a pension or retirement plan were not covered by § 4(f)(2) and consequently could not be forced to retire. *See, e.g., Cowlishaw v. Armstrong Rubber Co.*, 450 F. Supp. 148, 153-54 (E.D.N.Y. 1978).

⁵⁴ *See, e.g., Zinger v. Blanchette*, 549 F.2d 901, 910 (3d Cir. 1977) (mandatory retirement not a violation of the ADEA); *Brennan v. Taft Broadcasting Co.*, 500 F.2d 212, 215 (5th Cir. 1974) (same).

⁵⁵ *Compare, e.g., Zinger*, 549 F.2d at 910 (mandatory retirement not an ADEA violation) and *Brennan*, 500 F.2d at 215 (same) with *McMann v. United Airlines Inc.*, 524 F.2d 217, 220-21 (4th Cir. 1976) (mandatory retirement violated § 4(f)(2)), *rev'd*, 434 U.S. 192, 195 (1977) (no violation).

⁵⁶ 434 U.S. 192 (1977).

⁵⁷ *Id.* at 196.

⁵⁸ *McMann* was decided on December 12, 1977, 434 U.S. at 192. At that time both the House and Senate had passed amendments to the ADEA. *See* 123 Cong. Rec. 9984-9985; *id.* at 17303. The Senate Report accompanying the 1978 Amendments, written before the Supreme Court's decision in *McMann*, expressed "congressional approval of the result reached by the fourth circuit in *McMann*." S. REP. NO. 493, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 504, 513. The House Conference Report, written after the Supreme Court handed down its decision in *McMann*, stated that the "conferees specially disagree with the Supreme Court's holding and reasoning in that case. Plan provisions in effect prior to the date of enactment are not exempt under section 4(f)(2) by virtue of the fact that they antedate the act or these amendments." H.R.

The 1978 Amendments to the ADEA⁵⁹ resolved any ambiguities in section 4(f)(2)'s language and essentially overruled *McMann* by making clear that a seniority or benefit plan may not require or permit involuntary retirement.⁶⁰ These 1978 Amendments restored balance to the ADEA by continuing to permit retirement plans, but not allowing retirement plans to circumscribe directly the employee's choice of whether to work. The legislative history of the 1978 amendments focused on the evils of "forced" and "involuntary" retirement.⁶¹ The legislative report accompanying the amendments emphasized two primary problems concerning mandatory retirement. First, the report found that "chronological age alone is a poor indicator of ability to perform a job."⁶² There is ample evidence that the aging process does not on average impair the work abilities of individuals from 55 to 70 years of age.⁶³ The probability of decline in work performance may increase as the individual grows older but actual decline is much more diffuse as persons age than is the physical maturation process in youths.⁶⁴ As a result, age is significantly less predictive as an indicator of decline than as an indicator of maturity. Second, the report concluded that "mandatory retirement works severe injustices against the aged."⁶⁵

CONF. REP. NO. 950, 95th Cong., 2d Sess., reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 528, 529 [hereinafter H.R. CONF. REP. NO. 950].

⁵⁹ Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 2(a), 92 Stat. 189, 189 (1978) (codified as amended at 29 U.S.C. § 523(f)(2) (1982)). The House Conference Report accompanying the Amendments stated that the purpose of the § 4(f)(2) amendment was "to make absolutely clear one of the original purposes of this provision, namely, that the exception does not authorize an employer to require or permit involuntary retirement of an employee within the protected age group on account of age." H.R. CONF. REP. NO. 950, *supra* note 58, at 529. See also Note, *Federal Age Discrimination in Employment Act: The Pension Plan Exception After McMann and the 1978 Amendments*, 54 NOTRE DAME L. REV. 323 (1978) (discussing advisability and impact of 1978 Amendments to ADEA).

⁶⁰ It is not this Article's purpose to discuss whether *McMann* was correctly decided. The Court of Appeals and Supreme Court decisions in *McMann* sparked considerable debate, but the congressional action mooted the discussion. See, e.g., Comment, *The Problem of Involuntary Retirement Before Age 65*, 60 MARQ. L. REV. 1053 (1977); Doppelt & Takefman, *The Retirement-Plan Exemption in the Age Discrimination in Employment Act: The Bona Fide Employee Benefit Plan Exception*, 5 FORDHAM URB. L.J. 509 (1977); *Recent Development*, 66 GEO. L.J. 173 (1977). The 1978 Amendments provided a limited grandfather clause for plans established by certain collective bargaining agreements. Age Discrimination in Employment Act Amendments of 1978, Pub. L. 95-256, § 2(b), 92 Stat. 189, 189 (1978). See also 29 C.F.R. § 1625.9(d)(1)-(2) (1987). The EEOC regulations state that the new prohibition against mandatory retirement applied to all cases pending at the date of the Amendment or filed thereafter, regardless of whether the plaintiff involuntarily retired before or after enactment of the amendments. 29 C.F.R. § 1625.9(b)(2) (1987). Most courts that have considered the issue, however, have rejected the government's position that the prohibition against mandatory retirement operated retroactively. See, e.g., *EEOC v. Shell Oil Co.*, 637 F.2d 683, 684 (9th Cir. 1981); *Carpenter v. Continental Trailways*, 635 F.2d 578, 580 (6th Cir. 1980); *Smart v. Porter Paint Co.*, 630 F.2d 490, 497-98 (7th Cir. 1980); *Jenson v. Gulf Oil Refining & Marketing Co.*, 623 F.2d 406, 409-13 (5th Cir. 1980); *Sikora v. American Can Co.*, 622 F.2d 1116, 1119-24 (3d Cir. 1980). But see *Davis v. Boy Scouts of Am.*, 457 F. Supp. 665, 673 (D.N.J. 1978).

⁶¹ S. REP. NO. 493, *supra* note 58, at 513 ("forced retirement extinguishes an individual's right to employment and thus is not excused by Section 4(f)(2) unless the retirement is based on some reason other than age, such as disability or poor performance").

⁶² *Id.* at 505.

⁶³ See, e.g., L. BRONTE & A. PIFER, *OUR AGING SOCIETY: PARADOX AND PROMISE* 61-62 (1986).

⁶⁴ E. PALMORE, *HANDBOOK ON THE AGED IN THE UNITED STATES* xxi (1984).

⁶⁵ S. REP. NO. 493, *supra* note 58, at 506. See also H.R. REP. NO. 95-527, 95th Cong., 1st Sess., at 1-2 (1977).

An individual worker may not be financially able to retire at the time his or her employer imposes mandatory retirement.⁶⁶ In addition, workers may suffer adverse physical and psychological consequences from being forced out of the job market, particularly when the individual's job is strongly linked with social indicators such as money, social status, and social contacts.⁶⁷

Eliminating mandatory retirement is grounded in the concept of individual rights. At the time mandatory retirement developed, employment-at-will concepts were becoming entrenched in the common law.⁶⁸ Individual employee rights were viewed as subordinate to the employer's business or managerial decisions. A revolution has since occurred in the concept of employee rights,⁶⁹ and at the same time the political power of older members of our society has increased significantly.⁷⁰ It was inevitable that the

⁶⁶ S. REP. NO. 493, *supra* note 58, at 506–07. *But see* E. PALMORE, B. BURCHETT, G. GILLENBAUM, L. GEORGE & L. WALLMAN, *RETIREMENT: CAUSES AND CONSEQUENCES* 73–76 (1986) [hereinafter *CAUSES AND CONSEQUENCES*] (study found no negative financial consequences resulting from mandatory retirement; [authors posit] that those who are subject to mandatory retirement are more likely to work for large corporations with good pension systems). When viewed as an issue of individual rights, however, the absence of a statistically based impact does not negate the existence of individual unfairness.

⁶⁷ S. REP. NO. 493, *supra* note 58, at 507; A. FONER, *AGING AND OLD AGE: NEW PERSPECTIVES* 39 (1986). *But see* E. PALMORE, *supra* note 64, at 73–76. Congress cited the adverse consequences of mandatory retirement in order to justify eliminating mandatory retirement. A plaintiff need not show actual adverse consequences in order to state a cause of action under the ADEA.

⁶⁸ *See* M. GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* 149–51 (1981) (employment-at-will-doctrine evolved in the late nineteenth century). Mandatory retirement emerged as a common practice with the advent of industrialized society in the late nineteenth century. Mandatory retirement first appeared in certain industries in which technological advances made workers obsolete. W. Graebner, *Retirement and the Origins of Age Discrimination*, in *READINGS IN THE POLITICAL ECONOMY OF AGING* 177 (M. Minkler & C. Estes, ed. 1984). Between 1885 and 1915, for example, age limits became common in the printing industry. *Id.* at 179. *See also* J. LEVIN & W. LEVIN, *Ageism: Prejudice and Discrimination Against the Elderly* 87–90 (1980). Shorter life spans may explain why mandatory retirement was uncommon before the nineteenth century. At the same time that increased longevity, immigration, and birth rates provided a steady supply of workers, retirement became an accepted industry method to phase out older workers on an impersonal basis. W. Graebner, *Supra*, at 198. Ironically, the Social Security Act of 1935, which was designed only to provide workers the option to retire, spurred the industry practice of mandatory retirement both by creating employee expectation of the right to retire and by encouraging employers to establish private pension plans that paralleled Social Security provisions. W.A. ACHENBAUM, *SHADES OF GRAY: OLD AGE, AMERICAN VALUES, AND FEDERAL POLICIES SINCE 1920* 101 (1983). Social Security also has been characterized as a “subsidized segregation of the elderly” that “implicitly condoned” mandatory retirement and devalued American elderly. J. WILLIAMSON, L. EVANS, L. POWELL, *THE POLITICS OF AGING: POWER AND POLICY* 228 (1982) [hereinafter *THE POLITICS OF AGING*]. After World War II the number of workers covered by private pensions increased significantly. Such plans increasingly provided for mandatory retirement. W.A. ACHENBAUM, *supra*, at 198. By 1974, 41% of all employees covered by private pension plans were subject to mandatory retirement. S. REP. NO. 493, *supra* note 58, at 512 (citing 1974 Bureau of Labor Statistics Study). By 1985, when the ADEA protected workers up to age 70, 51% of workers covered by pension plans were subject to mandatory retirement at age 70. Chairman of the Subcommittee on Health and Long Term Care of the Select Committee on Aging, 99th Cong., 2nd Sess., Report on Eliminating Mandatory Retirement (Comm. Print 1986).

⁶⁹ M. GLENDON, *supra* note 68, at 143.

⁷⁰ *See generally* *THE POLITICS OF AGING*, *supra* note 68. Older Americans effectively have been united due to identification of common interests, such as a common interest in protecting Social Security. *See id.* at 89–90. In addition, the increased use of private pension plans has resulted in the accumulation of a large amount of capital that plan administrators invest for the purpose of

equal employment opportunity concepts associated with race, sex, religion, and national origin classifications would be extended to age.

The overarching principle of individual rights in American law undermines the justification for mandatory retirement.⁷¹ For example, employers argue that mandatory retirement obviates the need for individual determinations, which are often difficult and more expensive for the employer than a blanket rule.⁷² Mandatory retirement arguably creates job opportunities for the young, women, and minorities.⁷³ Businesses also can predictably plan job openings and avoid the increased pension, insurance, and salary costs of older workers.⁷⁴ In some businesses youth and corresponding physical attractiveness are highly-prized characteristics.⁷⁵ These arguable benefits of mandatory retirement, however, are the same kind of benefits that employers have used to justify race or sex discrimination.

Diffused benefits are seldom forceful arguments in support of unlimited freedom to discriminate when weighed against equal opportunity, particularly when the discrimination causes individual hardship.⁷⁶ This reasoning applies as well to justifications for mandatory retirement that are based on concern for older employees as a group. For example, an employer's determination that an individual employee can no longer make it in the workforce erodes that employee's self-esteem.⁷⁷ It is arguably kinder to require mandatory retirement for all workers over a certain age rather than individual determinations that will be personally devastating for those employees who are determined to be incompetent. This rationale for mandatory retirement, however, sacrifices the interests of the older employees who can work for the interests of the older employees who cannot work. Because of the societal focus on individual, rather than group, rights, it is not surprising that this justification is also not sufficient to override the concern for the older employee who is both competent and wishes to remain in the workforce.⁷⁸

disbursing to retired workers, which in turn gives pension plans the means to lobby for favorable tax treatment. STATISTICAL ABSTRACT OF THE UNITED STATES, 1987 (in 1970, private pension fund assets were \$151 million; in 1985, private pension fund assets were \$1.132 billion.).

⁷¹ See J. WALKER & H. LAZER, *THE END OF MANDATORY RETIREMENT: IMPLICATIONS FOR MANAGEMENT* 12-13 (1978) (summarizes arguments for and against mandatory retirement).

⁷² See *id.* at 12.

⁷³ *Id.* at 13.

⁷⁴ *Id.* But see Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 252 (1971) (employers incur costs when they act contrary to ethical norms).

⁷⁵ U.S. DEPT. OF LABOR, *OCCUPATIONAL OUTLOOK HANDBOOK* (1984-85).

⁷⁶ See S. REP. NO. 493, *supra* note 58, at 505-07. Even a small increase in participation of persons aged 65 to 70 in the labor market will have a positive economic effect. See *id.* at 507 (mandatory retirement cost the nation 4.5 billion 1976 dollars). See also H.R. Doc. No. 40, 90th Cong., 1st Sess. 7 (1967).

⁷⁷ McGarity & Schroeder, *Risk-Oriented Employment Screening*, 59 TEX. L. REV. 999, 1015 (1981).

⁷⁸ Consistent with the 1978 Amendments to the ADEA, courts have held since 1978 that involuntary early retirement based on an employee's age and different treatment of employees who are eligible for early retirement both violate the ADEA. See, e.g., *EEOC v. Borden's, Inc.*, 724 F.2d 1390, 1394 (9th Cir. 1984) (court found that collective bargaining agreement which provided that employees eligible for early retirement were not eligible for severance pay violated the ADEA); *EEOC v. Chrysler Corp.*, 733 F.2d 1183, 1186, *rehearing en banc denied* (with opinion), 738 F.2d 167 (6th Cir. 1984) (court found that employer's policy which provided that employees eligible for early retirement were not eligible for layoff status, violated the ADEA); *EEOC v. Westinghouse Elec. Corp.*, 725 F.2d 211, 222-23 (3d Cir. 1984) (some employees eligible for early retirement not eligible

C. The Language and Legislative History and Early Retirement

The ADEA prohibits "discrimination" and states that "involuntary" retirement is prohibited by the Act. Both "discrimination" and "involuntary" emphasize the reaction of the employee. The language and legislative history of the Act demonstrates that the employee's voluntariness is the pivotal concept in the ADEA's regulation of retirement.

The ADEA makes it unlawful for an employer to "discriminate against" an employee "because of such individual's age."⁷⁹ This language establishes a common thread in any ADEA discharge case. Where a termination is at issue, the phrase to "discriminate against" necessarily implies that the employee left his or her employment because the employer took some action based on age that disadvantaged the employee. This means that the employer's act is wrongful if it inures to the employee's disadvantage. That disadvantage cannot be governed by an objective standard. It would be wholly inconsistent with the ADEA's goals to allow employers to claim a paternal "best interest" — that the employee is in fact better off retired or working in some other organization even though the employee does not recognize it. Congress obviously rejected this paternalistic justification when it prohibited mandatory retirement.⁸⁰ Rather, the employee can show disadvantage by demonstrating at a minimum that the result is one that the employee does not seek or want. In race or sex discrimination cases courts call on common experience to acknowledge that few people desire lower wages than similarly situated employees.⁸¹ Common experience with retirement shows that some, but by no means all, similarly situated older employees will want to retire voluntarily from the job mar-

for layoff benefits, held violation of the ADEA); *EEOC v. County of Calumet*, 686 F.2d 1249 (7th Cir. 1982); *EEOC v. Liggett & Meyers Inc.*, 29 FEP Cases 1611 (E.D.N.C. 1982).

Although an employer cannot force an employee to take early retirement under § 4(f)(2), the employer can still terminate or lay off the employee. An employer can even offer an early retirement option without violating the Act if the decision is based on a reasonable factor other than age. 29 U.S.C. § 623(f)(1) (1982); *Coburn v. Pan Am. World Airways*, 711 F.2d 339, 345 (D.C. Cir.) (plaintiff may have been treated unfairly but record was devoid of evidence that age was a "determining factor" in decision to terminate plaintiff), *cert. denied*, 464 U.S. 994 (1983); *Halsell v. Kimberly-Clark Corp.*, 683 F.2d 285, 291-92 (8th Cir. 1982) ("the issue is not whether the reason articulated by the employer warranted the discharge, but whether the employer acted for a nondiscriminatory reason"); *Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66, 70 (6th Cir. 1982); *Cline v. Roadway Express, Inc.*, 689 F.2d 481, 487 n.7 (4th Cir. 1982); *Parcinski v. Outlet Co.*, 673 F.2d 34, 36 (2d Cir. 1982), *cert. denied*, 459 U.S. 1103 (1983); *Kephart v. Institute of Gas Technology*, 630 F.2d 1217, 1223 (7th Cir. 1980), ("[t]he question before the court is not whether the company's methods were sound, or whether its dismissal of [the plaintiff] was an error of business judgment" but "whether [the plaintiff] was discriminated against because of his age"), *cert. denied*, 450 U.S. 959 (1981). Corporate reorganizations, job eliminations, and reductions in force will occur and the ADEA does not automatically protect workers over 40 from these adverse employment actions. Older workers are only protected to the extent that the employer's decision concerning the individual worker is based on the employee's age. *Parcinski*, 673 F.2d at 36; *Smith v. Reynolds Chemical*, 636 F.2d 1116, 1117 (6th Cir. 1980). An employer, however, is highly unlikely to get summary judgment in such a case. *FED. R. Civ. P.* 56(c).

⁷⁹ 29 U.S.C. § 623(a)(1) (1982).

⁸⁰ See *supra* notes 59-67 and accompanying text.

⁸¹ A call to "common experience" can be a powerful and dangerous legal argument. "Common experience" can vary significantly due to a person's background and individual characteristics. See Minow, *supra* note 28. Calling on common experience, however, is a less dangerous argument when it supports giving individuals a range of real, not illusory, choices.

ket.⁸² For an employer merely to provide this desired retirement opportunity cannot always be labeled as "discrimination against" the older employee any more than providing employees who have had no higher education the opportunity to go to college is "discrimination against" employees who will decide not to take advantage of the opportunity.⁸³ Offering benefits that not all employees will take advantage of in precisely the same way is not automatically discrimination.

Section 4(f)(2)'s statutory exception also recognizes that voluntariness is the dividing line between lawful and unlawful activity under retirement programs. As noted above, Congress amended section 4(f)(2) in response to the Supreme Court's holding in *McMann* that the ADEA did not prohibit mandatory retirement. Congress responded by not just outlawing mandatory retirement, but also by prohibiting *involuntary* retirement. The word "involuntary" focuses directly on the individual employee's freedom of choice.⁸⁴

The ADEA's legislative history is replete with evidence that a significant goal of the Act was to protect and enhance the employee's freedom of choice.⁸⁵ The Committee Report accompanying the 1978 Amendments states that the Amendments were passed "to protect older workers from involuntary retirement,"⁸⁶ "to insure that older individuals who desire to work will not be denied employment opportunities solely on the basis of age,"⁸⁷ and to outlaw "mandatory retirement."⁸⁸ Congress emphasized the autonomy of the individual employee: "For capable older workers the retirement decision should be an individual option. Maximum freedom of choice should be given to employees in deciding when to retire, provided they are still physically and psychologically able to perform their jobs in a satisfactory manner."⁸⁹ Although the 1978 Committee Report

⁸² See *infra* notes 96–109, and accompanying text for a discussion of American workers' varying attitudes about retirement.

⁸³ See *Henn v. National Geographic Soc'y*, 819 F.2d 824, 828 (7th Cir. 1987) ("[r]etirement is an innocuous event, coming once to many employees and more than once to some").

⁸⁴ See *infra* notes 154–86 and accompanying text for a discussion of the attributes of "involuntary" retirement.

⁸⁵ In recommending the ADEA's passage in his Older Americans Message on January 23, 1967, President Lyndon B. Johnson focused on the opportunities of older workers: "[h]undreds of thousands, not yet old, not yet *voluntarily* retired, find themselves jobless because of arbitrary age discrimination . . . Opportunities must be opened to the many Americans over 45 who are qualified and *willing to work*." 113 Cong. Rec. 34,743–44 (1967) (emphasis added). See also H.R. REP. NO. 805, *supra* note 2, at 2214.

⁸⁶ S. REP. NO. 493, *supra* note 58, at 504.

⁸⁷ *Id.* "A person with the ability and desire to work should not be denied that opportunity solely because of age." *Id.* at 506.

⁸⁸ *Id.* at 504.

⁸⁹ *Id.* at 506 (emphasis added). See also 132 Cong. Rec. H 8,126 (daily ed. Sept. 23, 1986) (statement of Rep. Waxman) ("[The ADEA] does provide [senior citizens] with an important choice"); *id.* (statement of Rep. Smith) ("[Older Americans] have a right to be there if they can and want to do the job."); *id.* at H8,127 (statement of Rep. Tauke) ("[i]f older Americans want to continue to work and earn a living when they are past the age of 70, there would be no obstacles barring them from doing so"); *id.* at H8,128 (statement of Rep. Gilman) ("and to let our senior citizens decide for themselves whether they want to fly south for their winters"); *id.* at H8,130 (statement of Rep. Lehman) ("[o]ur older workers should be able to make employment decisions for themselves, free from age discrimination requirements"); S. REP. NO. 493, *supra* note 58, at 506 ("[f]or capable older workers the retirement decision should be an individual option"); 123 Cong. Rec. 29,007 (statement of Rep. Biaggi) ("[w]e should insure that our own elderly citizens also have the right of self-determination with respect to employment . . ."); *id.* at 29,012 (statement of Rep.

reflected Congress's recognition that the demographic changes to an older workforce will place a heavy burden on Social Security, "the [conference] committee [did] not suggest that workers should be required to continue working beyond 65," but only that employees should not be discouraged from working longer.⁹⁰ Similarly, the 1986 Amendments that removed the ADEA's upper age limitation indicate no intent to interfere with *voluntary* retirement decisions.⁹¹ EEOC regulations, consistent with this interpretation, flatly state that nothing in the ADEA prohibits allowing individuals "to elect early retirement at a specified age at their own option."⁹²

Grassley) ("[c]learly, to force older workers to retire simply on the basis of age is to deny them the right to exercise their freedom fully . . ."); *id.* (statement of Rep. Fish) ("[i]t should be their choice to decide to retire or to continue to work. The . . . [ADEA] will provide our older working citizens with the choice that has been denied them for so long."); *id.* at 34,296-98 (statement of Sen. Javits) ("what we seek to do through this act is to assure older workers the opportunity to participate, or not participate, in the workforce in the manner they themselves choose . . . permitting each person to continue working past age 65 as a matter of individual choice and ability . . . [t]he heart of the matter is personal opportunity . . .").

⁹⁰ S. REP. NO. 493, *supra* note 58, at 507. The structure of pension plans and retirement incentives indirectly discourage employees from working longer by making retirement financially attractive. See *infra* notes 123-25 and accompanying text.

⁹¹ H.R. REP. NO. 756, 99th Cong., 2d Sess., reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 5628, 5633. (1986) [hereinafter H.R. REP. NO. 756] ("would ensure that those Americans age 70 and over who desire to continue working and are able to continue performing in a competent fashion are not denied the basic human right right to earn a living"). The ADEA's legislative history is replete with indications that the statute's goal was to allow employees to remain productive members of the workforce if they so wished. See, e.g., H.R. REP. NO. 756, *supra*, at 5640 (Individual view of Rep. Biaggi) (bill allows "a person to work past 70 should they want to . . ."); 132 Cong. Rec. H8,126 (daily ed. Sept. 23, 1986) (statement of Rep. Waxman); *id.* at H8,126 (statement of Rep. Smith); *id.* at H8,131 (statement of Rep. McCain); *id.* (statement of Rep. Chappell); H.R. REP. NO. 493, *supra* note 58, at 507; 123 Cong. Rec. 34,294 (statement of Sen. Williams). Individual members of the House and Senate recognized that early retirement exists and many included on the record comments that nothing in the ADEA should be interpreted to prevent voluntary early retirement. See, e.g., 132 Cong. Rec. H8,123 (daily ed. Sept. 23, 1986) (statement of Rep. Martinez) ("[t]his bill does not change the fact that workers who choose to retire early and take advantage of early retirement incentives provided by some employers can still do so"); *id.* at H8,126 (statement of Rep. Waxman) ("[t]here is no question that many workers look forward to retirement and have no interest in working past the age of 70"); H.R. REP. NO. 493, *supra* note 58, at 510 ("very few employees will choose to work until 70"); 123 Cong. Rec. 29,012 (statement of Rep. Pickle) ("[t]hat is not to say that voluntary retirement should be discouraged"); *id.* at 30,569 (statement of Rep. Hammerschmidt) ("[B]anning mandatory retirement would not abolish retirement. Indications are that the actual number of employees who would opt to continue working past age 65 would probably be quite small."); *id.* at 34,297 (statement of Sen. Javits) ("[T]he trend . . . has been toward early retirement A recent Roper poll found that nearly two-thirds of Americans would like to retire before age 62, and over one-third prefer to retire before reaching 60."); *id.* at S34,300 (statement of Sen. Cranston discussing the amendment excepting tenured professors from the ADEA's provisions) ("[T]he facts are that very few professors who have the choice actually continue working.").

The 1986 ADEA amendments also prohibit employers from refusing to limit or stop accrual of pension benefits for employers who work beyond the traditional retirement age. See Omnibus Budget Reconciliation Act of 1986, Pub. L. 99-509, § 9201, 100 Stat. 1874, codified at § 4(i)(1), 29 U.S.C. § 623(i)(1). This amendment also broadens employees' choices by disallowing employers from indirectly discouraging continued employment.

⁹² 29 C.F.R. § 1625.9(f) states: "Neither section 4(f)(2) nor any other provision of the Act makes it unlawful for a plan to permit individuals to elect early retirement at a specific age at their own option. Nor is it unlawful for a plan to require early retirement for reasons other than age." *Id.*

II. INCENTIVES TO RETIRE AND PRESUMPTIVE VALIDITY

As noted above, Congress intended to protect employees' voluntary retirement options while at the same time prohibit certain employer conduct. It does not necessarily follow that because an employee may voluntarily wish to retire early that the employer may lawfully encourage early retirement.⁹³ Voluntary retirement incentives, however, are an option that can yield significant benefits to both the employer and the employee. Consequently, employers should not be disempowered from offering retirement incentives.

A. Incentives from the Employee's Perspective

Sixty-five is commonly viewed as the retirement age, probably because it is the age at which individuals may receive Social Security benefits.⁹⁴ Although Congress eliminated the ADEA's upper age limit in 1986, 65 continues to be the age at which an employee currently can receive full benefits both under Social Security and most private pension plans.⁹⁵ As the preceding section demonstrates, the ADEA is structured to protect employees' retirement interests. The retirement patterns of American workers demonstrate that retiring is exactly what a large number of employees want to do.

There is a significant pattern of voluntary early retirement in the United States.⁹⁶ Over 70 percent of all new Social Security awards are made to individuals who accept reduced benefits by retiring before the age of 65.⁹⁷ As a result of this trend, both Congress and the business community recognized that prohibiting mandatory retirement and raising the ADEA's upper age limit to 70 were unlikely to affect significantly the composition of the workforce.⁹⁸ Similarly, in 1986 Congress predicted that eliminating

⁹³ For example, it would probably violate Title VII of the Civil Rights Act of 1964 if an employer offered all black employees \$1000 to resign. Even if the employees want that option, as a matter of public policy the courts would likely rule that offer unlawful. *See* 42 U.S.C. § 2000e-2(a) (1982).

⁹⁴ Social Security Act of 1935, ch. 531, 49 Stat. 620, 623 (1935). According to common belief, age 65 was selected because Otto von Bismark, the first chancellor of the German empire, used age 65 in the Old Age and Survivors Pension Act. *See* HOUSE SELECT COMM. ON AGING, 95TH CONG., 1ST SESS., MANDATORY RETIREMENT: THE SOCIAL AND HUMAN COST OF ENFORCED IDLENESS (Comm. Publ. No. 95-91, 1977); S. REP. NO. 493, *supra* note 58, at 525 (65 was selected "because of the use of this age in pre-war Germany's social security system.").

⁹⁵ *See supra* note 1 and *infra* notes 123-25. The ADEA's upper age limit had been lifted for only a short period when this Article was written. There is little reason to believe that eliminating the upper cap will alter early retirement patterns. *See* SUBCOMMITTEE ON HEALTH AND LONG-TERM CARE, SELECT COMMITTEE ON AGING, 99TH CONG., 2D SESS., REPORT OF THE CHAIRMAN 6 (Comm. Pub. No. 99-561) (1986).

⁹⁶ Between June 1980 and May 1981, 76% of all male Social Security recipients and 84% of the women opted to receive benefits before the age of 65. 48 Social Security Bulletin 22, 23 (1985). J. WALKER & H. LAZER, *supra* note 71, at 8. *See also* Fullerson, *The 1995 Labor Force: A First Look*, 103 MONTHLY LAB. REV. 11, 16-17 (Dec. 1980). The trend toward early retirement has slowed in recent years. SUBCOMMITTEE ON HEALTH AND LONG-TERM CARE, SELECT COMMITTEE ON AGING, 99TH CONG., 2D SESS., REPORT OF THE CHAIRMAN 6 (Comm. Pub. No. 99-561) (1986).

⁹⁷ *Id.*

⁹⁸ S. REP. NO. 493, *supra* note 58 at 507. ("[E]stimates by the Department of Labor indicate that if mandatory retirement had been prohibited for all workers under 70 years of age in 1976, the male labor force would have increased by only one-tenth to two-tenths of a percent. For the female labor force the figure would have been one-tenth of a percent. This represents an increase in the labor force of approximately 200,000 per year.") *See also* J. WALKER & H. LAZER, *supra* note 71, at

the upper age limit would only marginally affect the number of older workers in the workforce.⁹⁹

One significant factor that has enhanced the attraction of early retirement is the changing concept of work and leisure by American workers.¹⁰⁰ At one time, retirement was viewed primarily as the brief stop between terminating work-life and death. Increased longevity and general health for older Americans has changed the role of retirement. For many Americans work is no longer an end in itself, but a means to allow one to pursue leisure activities.¹⁰¹ Retirement for many has become "a well-deserved and earned release from the instrumental chores of work."¹⁰² A 1981 national poll indicated that 45 percent of the public looks forward to retiring.¹⁰³ An even higher percentage of the public looks forward to retiring if they are likely to have sufficient financial means to be self-supporting.¹⁰⁴

The individual employee's decision to retire early is clearly a personal decision affected by a complex interaction of factors.¹⁰⁵ Studies indicate that early retirement decisions, however, are primarily affected by the employee's attitudes toward work and retirement, perceptions of health, and adequacy of retirement income.¹⁰⁶ Although an employer can have an impact on an employee's attitude toward work and general health, such factors will generally yield to the employee's economic concerns.¹⁰⁷ The most obvious, immediate, and direct influence an employer can have on the employee's retirement decision comes through the financial benefits the employer can provide to the employee on his or her retirement.¹⁰⁸ Consequently, for many employees the desire to retire cannot be satisfied without the employer's cooperation. To disempower the

8 (1978) ("experience suggests that relatively few employees will wish to prolong their work careers").

The profile of the typical age discrimination plaintiff supplies inferential support for this point. In 1981 only 5% of all ADEA charges filed with the EEOC were filed by persons aged 65-69. S. McConnell, *Age Discrimination in Employment*, in *POLICY IN WORK AND RETIREMENT* 167 (H. Parnes, ed. 1983).

⁹⁹ SUBCOMMITTEE ON HEALTH AND LONG-TERM CARE, SELECT COMMITTEE ON AGING, 99TH CONG., 2D SESS., REPORT OF THE CHAIRMAN 4, 6 (Comm. Pub. No. 99-561) (1986); H.R. REP. 99-756, 99TH CONG. 2D SESS. 4 (1986) (accompanying H.R. 4154).

¹⁰⁰ See *infra* notes 101-07.

¹⁰¹ W. A. ACHENBAUM, *supra* note 68, at 59-61; Sonnenfeld, *supra* note 48, at 82.

¹⁰² W. A. ACHENBAUM, *supra* note 68, at 60.

¹⁰³ LOUIS HARRIS & ASSOCIATES, INC., AGING IN THE EIGHTIES: AMERICA IN TRANSITION, A STUDY FOR THE NATIONAL COUNCIL ON THE AGING, INC. 50-51 (1981) [hereinafter AGING IN THE EIGHTIES]. The Harris poll also revealed that 49% of the public do not look forward to retirement. *Id.* Whatever view the reader associates with, it is evident that few workers are neutral on the subject of retirement. Most important for purposes of this discussion, a significant segment of the workforce perceives retirement as an attractive alternative.

¹⁰⁴ *Id.*

¹⁰⁵ Rones, *The Retirement Decision: A Question of Opportunity?*, 103 MONTHLY LAB. REV. 14, 15 (Nov. 1980).

¹⁰⁶ W. A. ACHENBAUM, *supra* note 68, at 58-62; CAUSES AND CONSEQUENCES, *supra* note 66, at 35.

¹⁰⁷ See M. GLENDON, *supra* note 68, at 171 (referring to factors that influence employee decisions to change jobs: "job satisfaction, while extremely significant, must usually yield to the employee's perception of his [or her] economic condition").

¹⁰⁸ Employer policies that affect all employees can have a significant impact on how much an individual employee enjoys his or her work. The employer usually has a lesser affect on the employee's health, except to the extent that work-related stress, exposure to hazardous conditions, and preventive health care affect the individual's health.

employer from offering retirement incentives inevitably circumscribes the employee's retirement options.

The employee's ability to elect early retirement is also consistent with the concept of individual rights embodied in the ADEA.¹⁰⁹ As noted above, Congress eliminated mandatory retirement based on its concern for individual fairness; an employee should be judged on his or her merit.¹¹⁰ The prevalence of retirement, through Social Security and private pensions, has also created the expectation of retirement.¹¹¹ Just as the concept of an employee's "right" not to be forced to retire emerged as the driving force behind eliminating mandatory retirement, so too has emerged an equally strong "right" to decide whether to retire.¹¹² Thus, eliminating mandatory retirement at the same time that there is a trend toward early retirement is no paradox. Both enhance the individual employee's freedom of choice.

The individual worker's choice and, therefore, consent as a justification for retirement incentives is not inherently an illusory or fictional consent, unlike the economic justifications for many social transactions.¹¹³ An individual employee's desire to retire is often motivated by a desire to maximize personal happiness.¹¹⁴ Many people — but not all — want to retire in order to devote time to leisure activities.¹¹⁵ Even when a worker's decision to retire early is due to variables such as ill health, these variables are generally independent of the employer's actions.¹¹⁶

In addition, there is no reason to think that a worker cannot consider rationally whether to retire. All employees should not be deprived of the options provided by retirement incentive programs solely because the choice may be difficult for some employees.¹¹⁷ Voluntary retirement, when not compelled by poor health, can and often does result in positive effects, including an increase in life satisfaction.¹¹⁸ There is, in addition, no demonstrable decline in health due to voluntary retirement.¹¹⁹ Furthermore,

¹⁰⁹ Preserving an employee's retirement options obviously is consistent with making a wide pattern of choices available to the worker. Employees have the right to quit anytime they wish, absent a binding contract. U.S. CONST. amend. XIII. If the individual employee is contractually entitled to benefits through a pension plan, he or she has a judicially enforceable interest. Even with a binding contract, however, the appropriate remedy for breach of a personal services contract is damages, not specific performance. RESTATEMENT (SECOND) OF CONTRACTS § 367(1) (1981); 11 WILLISTON ON CONTRACTS §§ 1423, 1450 (3d ed. 1968 and Supp. 1987).

¹¹⁰ See *supra* notes 68–78 and accompanying text.

¹¹¹ AGING IN THE EIGHTIES, *supra* note 103, at 50 (approximately 45% of the population looks forward to retirement; 54% of retired individuals aged 65 and over with annual incomes of \$20,000 looked forward to stopping work).

¹¹² *Id.*

¹¹³ See West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384, 394–95 (1985).

¹¹⁴ See *supra* notes 101–02.

¹¹⁵ *Id.*

¹¹⁶ Cf. *Colorado v. Connelly*, 107 S. Ct. 515 (1986) (confession given because of individual's internal compulsion still "voluntary" for Fifth Amendment purposes absent police coercion or wrongdoing). Although the method or form of the offer may undermine the voluntariness of the employee's choice, regulating the circumstances of the offer can eliminate the danger of coercion or illusory consent. See *infra* § III of this Article.

¹¹⁷ *Henn v. National Geographic Soc'y*, 819 F.2d 824, 826 (7th Cir. 1987).

¹¹⁸ CAUSES AND CONSEQUENCES, *supra* note 66, at 77–80 (documents consequences of voluntary retirement).

¹¹⁹ *Id.* at 78–79.

even if voluntary retirement provided no demonstrable benefit to older workers as a group, there is no reason to conclude that individual older workers are unable to make a decision, based on their personal life circumstances, about whether to retire voluntarily.

The possibility remains that by merely providing a retirement incentive, targeted to a particular group of employees, the employer skews the employee's choice by creating the impression that the employee is no longer wanted. The employee might then defer to the employer's authority.¹²⁰ It would be highly inappropriate, however, for Congress or the courts to prohibit retirement incentives *carte blanche* based on an undocumented perception that the offer taints the choice. In general, workers perceive retirement as a benefit, as evidenced by the significant number who view retirement positively and who elect early retirement.¹²¹ Thus, the possibility of voluntary retirement can be characterized accurately as an employee benefit. If some of the employees within the target group genuinely wish to retire, to prohibit outright the special incentives would deny them a benefit. Even if a retirement incentive inherently carries with it an element of coercion, as discussed at length in Section III, the more appropriate response is to regulate the form in which the offer is made — for example, by designating that it cannot be tailored to a single employee, and refining the definition of "voluntary" retirement. These less restrictive alternatives protect the early retirement option for those employees who wish to take advantage of it while preventing employers from silently coercing employees who do not wish to retire into accepting the retirement incentive. The ADEA rejected paternalism as a justification for mandatory retirement.¹²² It follows naturally that Congress similarly intended to reject paternalism as a justification for prohibiting retirement incentives.

B. Incentives from the Employer's Perspective

A significant percentage of pension plans provide some form of early retirement at reduced benefits if the employee so elects.¹²³ Not only is offering early retirement a common practice, but additionally most such plans provide greater benefits than would be available under an actuarial reduction based on age.¹²⁴ This indicates that manage-

¹²⁰ West, *supra* note 113, at 400.

¹²¹ See *supra* notes 96–108 and accompanying text for a discussion on the role of retirement. Evidence of early retirement patterns loses its force, however, if the current early retirement pattern is itself coerced because of age discrimination. At least from the employees' perspective, however, no data supports this claim. A 1981 Harris poll found that a majority of American workers said that they left work by choice. AGING IN THE EIGHTIES, *supra* note 103, at 53 (62% said they left work by choice; 37% reported that they felt "forced into retirement," but two-thirds of those who felt forced reported that "poor health" and "disability" were the reason they were forced to retire; poll included workers involuntarily retired under pre-1978 pension plans). See also *Karlen v. City Colleges of Chicago*, 837 F.2d 314, 317 (7th Cir. 1988) ("[n]or can it seriously be argued that the concept of early retirement for workers over a specified age stigmatizes such workers").

¹²² See *infra* notes 62–67 and accompanying text.

¹²³ See S. RHINE, *MANAGING OLDER WORKERS: COMPANY POLICIES AND ATTITUDES*, 4–6 (1984) (62% of the 363 surveyed corporations offered pensions plans that contained early-retirement inducements); A SURVEY OF RETIREMENT, THRIFT AND PROFIT-SHARING PLANS COVERING SALARIED EMPLOYEES AT 50 LARGE U.S. INDUSTRIAL COMPANIES AS OF JANUARY 1, 1987, at 8 (Wyatt Co. 1987) (in survey of the 50 largest U.S. industrial companies, all plans permitted retirement at age 60).

¹²⁴ S. RHINE, *supra* note 123, at 5 (92% of plans that offer discount provide greater than actuarial reduction); SURVEY, *supra* note 123, at 8 (of surveyed companies, all but three provided full benefits under some circumstances at age 62).

ment not only wants to give workers the opportunity to retire, but also wants that opportunity to be very attractive. Private pension benefits for early retirement go hand in hand with Social Security provisions for actuarially-reduced benefits if a worker retires early.¹²⁵

The opportunity to offer retirement incentives provides significant advantages to an employer. Employers frequently can achieve the benefits of mandatory retirement by encouraging voluntary retirement. For example, early retirement incentives are often a less harmful method than layoffs for implementing workforce reductions and corporate reorganizations.¹²⁶ In the last twenty years workforce reductions have reached into the ranks of mid- and upper-management.¹²⁷ In response, employers have become more sophisticated in reducing their workforce. Rather than automatically laying off employees, management may devise a series of actions, including a hiring freeze and programs to encourage employees to resign or retire. This yields two advantages to the employer. First, because older employees tend to be longer term and higher paid, the employer is likely to save more per employee by eliminating those positions or replacing the retired worker with lower-paid workers. Second, if a retirement incentive program is truly voluntary, employees who elect to retire receive a benefit that they would not otherwise receive. That employee is much more likely to be happy about leaving the company and has more financial stability than the employee who is involuntarily laid off and receives only severance benefits.¹²⁸ An employee who leaves happily is also less likely to litigate.¹²⁹

¹²⁵ 42 U.S.C. §§ 415(7), 416(l)(2) (1982). The Federal Employees Retirement Act, 5 U.S.C. § 8336 (1982), permits the voluntary retirement of federal employees who have reached the age of 50 with 20 years of service or those of any age with 25 years of service. This plan was upheld in a pre-1978 ADEA challenge. *Mason v. Lister*, 562 F.2d 343, 345 (5th Cir. 1977).

¹²⁶ S. RHINE, *supra* note 123, at 7 (80% of surveyed companies which offered open-window early-retirement incentives did so "to cut costs by reducing the workforce without resorting to involuntary layoffs"); 5 U.S.C. § 8336(d)(2) (1982) (authorizes early retirement when federal agency is going through a RIF).

¹²⁷ BNA Special Report, *White Collar Layoffs and Cutbacks*, 110 LAB. REL. REP. No. 31 (Aug. 16, 1982). Modern layoffs and workforce reductions often result in a permanent scale-back of the workforce, so that recalls are less likely. See EEOC 18TH ANNUAL REPORT 22 (1984) and cases cited therein (discussing lawsuits filed in 1983 concerning major workforce reductions or management reorganizations).

¹²⁸ This is particularly true if the employer's decision is based on employee ranking that results in laying-off the "least productive" employees. Congress did not deem the inherent harshness of individualized determinations sufficient justification to allow mandatory retirement under the ADEA. Nonetheless, individualized determinations do present problems which employers understandably may wish to avoid. Perry, *The Principle of Equal Protection*, 32 HASTINGS L.J. 1133, 1152-53 (1981).

¹²⁹ S. RHINE, *supra* note 123, at 12-13. Avoiding lawsuits, particularly ADEA lawsuits, can be a powerful incentive for making departing employees happy. The typical age discrimination plaintiff is more likely to be a white collar worker who is, through tenure or position, well-paid. Sholl & Strang, *supra* note 52, at 332 (1986) (informal empirical observations). Consequently, general damages through back or front pay under the ADEA accrue more quickly than damages in similar suits under Title VII, which typically involve less well-paid employees. See generally Hawks, *Future Damages in ADEA Cases*, 69 MARQ. L. REV. 357 (1986). This, in addition to the procedural benefits available to plaintiffs in ADEA discrimination suits, makes ADEA claims more expensive for employers. For example, in Fiscal Year 1983 the EEOC's average dollar settlement for an ADEA claim was two times the average settlement under Title VII and five times the average settlement under the Equal Pay Act. EEOC 18TH ANNUAL REPORT 13 (1983) (average ADEA settlement \$9,667; Title VII \$4,675; EPA \$1,818; ADEA settlement represents 54% increase over average dollar benefits for

There is also the obvious benefit to employee morale and public relations. The public interest at first glance appears satisfied because the factors that motivated eliminating mandatory retirement are absent when a worker voluntarily retires.

The employer may gain other advantages in implementing a voluntary incentive retirement program. Occasionally an employee who elects to retire saves the employer the painful task of making a merit-based termination. In addition, the well-publicized demographic trends indicate that the United States workforce is growing older.¹³⁰ Although early retirement has both positive and negative aspects from a business perspective,¹³¹ one perceived benefit is that early retirement opens up career opportunities for younger workers.¹³² Companies often have predictable advancement steps for employees. For example, one moves from accounts assistant, to accounts manager, to department head. When a position at one step is held by a worker who does not have the ability to move on to the next level, that position is no longer available as a training ground for other employees. Although no absolute correlation exists between age and so-called "position blockage," there is an obvious correlation between moving up the corporate ladder and age. High level employees generally are older because it takes years of work to reach that level. As the Supreme Court noted when it rejected an equal protection challenge to mandatory retirement, encouraging employees to retire may create "predictable promotion[al] opportunities and thus spur morale and stimulate superior performance in the ranks."¹³³

Standing alone, these rationales for why employers offer voluntary retirement may not justify allowing incentives. Although employers may receive a benefit from a homogenous workforce, it is a benefit that is extraordinarily slight when compared to the negative personal and societal consequences of race, sex, or national origin discrimination. Noting significant non-discriminatory reasons for the employer to offer retirement incentives, however, does indicate that allowing incentives will not automatically perpetuate age stereotypes by employers.¹³⁴ Even if some retirement incentives are motivated by age stereotypes, employees who are offered the choice still have a wider range of

Fiscal Year 1982). See also EEOC 17TH ANNUAL REPORT 7 (1982) (average ADEA settlement \$6,297; Title VII \$4,524; EPA \$2,038; ADEA settlement represents 46% decrease over average dollar benefits for Fiscal Year 1981); EEOC 16TH ANNUAL REPORT 9 (1981) (average ADEA settlement \$11,631; Title VII \$3,787; EPA \$1,861).

¹³⁰ See Rones, *supra* note 105 and Foner, *supra* note 67 at 19-20.

¹³¹ For the purposes of this discussion I have focused on the positive aspects of early retirement. Early retirement incentives can have some negative consequences, however. For example, older employees are often the most experienced workers and a voluntary retirement program may be "too successful" and depletes the employer of too many experienced workers.

¹³² S. RHINE, *supra* note 123 at 11.

¹³³ *Vance v. Bradley*, 440 U.S. 93, 98 (1979) (accepts legislative conclusion regarding value of mandatory retirement). See also *Lamb v. Scripps College*, 627 F.2d 1015 (9th Cir. 1980); *Palmer v. Ticcione*, 576 F.2d 459 (2d Cir. 1978), *cert. denied*, 440 U.S. 945 (1979); *O'Neil v. Baine*, 568 S.W.2d 761, 767 (Mo. 1978) ("permits an orderly attrition"); *Perry*, *supra* note 128. Employees may also believe that it is time to give someone else a turn. See *Perry*, *supra* note 128. For the obligatory Latin phrase, consider "tempus abire tibi est," loosely translated as "make way for someone else." Horace gave this advice to those who had ceased being productive. See E. EHRLICH, AMO, AMAS, AMAT AND MORE: HOW TO USE LATIN TO YOUR OWN ADVANTAGE AND TO THE ASTONISHMENT OF OTHERS 275 (1985).

¹³⁴ Age animus in this context means that the employer does not think older employees are as valuable as younger employees. In a workforce reduction, an employer may similarly value employees of all ages but still prefer to institute voluntary retirement rather than involuntary layoffs.

options than they would if incentives were not allowed. So long as the employee has the option of turning down the incentive to retire and will not be subjected to age discrimination if the incentive is declined — an important caveat — retirement incentives yield sufficient benefit to individual employees that they should be allowed.

C. Incentives and Social Benefit

Although voluntary early retirement can have positive benefits from the perspectives of both employers and employees, the social benefit is not as clear. Because a significant portion of governmental retirement benefits are funded by current workers, the United States workforce can only support a finite number of retired workers at current benefit levels.¹³⁵ The best example is the recent concern over the solvency of Social Security in light of changing demographics. In its effort to shore up the Social Security system, Congress has taken steps to discourage early retirement, such as raising the eligibility age for Social Security and the eligibility age for early retirement, both of which will be gradually phased in over the next decades.¹³⁶ Obviously, by raising the eligibility age for retirement the employee works longer, contributes to Social Security for a longer period and, so long as increased longevity does not outstrip the raised eligibility age, the payout period is shorter. Congress could have more vigorously discouraged early retirement by more radically amending Social Security to prohibit all early retirement and requiring proof of need before an individual could receive benefits. By regulating private pensions, Congress also could have prohibited such plans from providing pension benefits before the age of 65 or 70. Instead, Congress made moderate adjustments to Social Security and made the Employee Retirement Income Security Act (ERISA),¹³⁷ the statute that directly regulates pension plans, generally consistent with Social Security.¹³⁸

Presumably, Congress took a moderate approach to Social Security and ERISA not only because of the perceived benefits of retirement, but also because the American public strongly believes that such benefits are vested property rights not to be tampered with lightly.¹³⁹ Social Security and ERISA directly regulate financial options to retire and consequently are the appropriate forum for regulating the trend toward early retirement. By modifying Social Security and ERISA, the political process has already begun to deal with the social impact of early retirement.

Not only are the Social Security Act and ERISA uniquely suited for regulating national retirement policy, including the fundamental question of whether retirement should be encouraged, but the ADEA is also uniquely ill-suited for this task. The ADEA's

¹³⁵ See 42 U.S.C. § 401 (1982).

¹³⁶ See Social Security Amendments of 1983, Pub. L. 98-21, Title II, § 201(a), (c)(1)(D), Title III, §§ 301(c)(1), 303, 304(c), 305(c), 309(j)-(k), 332(a), 333(a), 97 Stat. 65, 107-09, 111, 112, 114, 117, 129 (1983) (codified at 42 U.S.C. § 416 (1982 and Supp. III 1985)). See also H.R. REP. NO. 25, 98th Cong., 1st Sess., reprinted in 1983 U.S. CODE CONG. & ADMIN. NEWS 219.

¹³⁷ 29 U.S.C. §§ 1001 *et seq.* (1982 and Supp. III 1985).

¹³⁸ See Tax Reform Act of 1986, Pub. L. No. 99-514, § 1106 reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS, Pamphlet No. 9A, 1,336; H.R. REP. NO. 426, 99th Cong., 2d Sess., reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 4075, 4527.

¹³⁹ See generally M. GLENDON, *supra* note 68, at 87-92. This perception is accurate in this author's view, although what is "earned" is subject to dispute. Rather than reducing the attractiveness of early retirement, Congress could force employers to enhance the attractiveness of employment for older workers. Congress could, for example, require employers to give equal benefits to older and younger employees without cost differentiation to the employees.

provisions are limited to considering the more immediate question of whether age discrimination played a part in the employer's decision concerning an individual employee. Such case-by-case determinations are not the appropriate vehicle for developing a national retirement policy. So long as the employer provides a retirement incentive that is voluntary, the incentives should be viewed as consistent with the goals of the ADEA.

Thus, two delicately balanced policies are at work: (1) adverse treatment in employment because of one's age is a social evil that the ADEA prohibits; (2) early retirement is an attractive option to a significant number of American workers that the ADEA should not prohibit. Early retirement options are attractive, however, only to the extent that they provide additional options that the employee can voluntarily accept or reject. Although retirement incentives should not be *inherently* suspect, the same perceived advantages that cause an employer to offer voluntary retirement can cause an employer to undermine the voluntariness of the incentive program. Some check is necessary to prevent these offers from becoming a disguised form of involuntary retirement or a way to discriminate against specific employees within the protected class who are excluded from an incentive plan. The need for controls on retirement incentives varies with the position of the employee who is challenging the incentives. Employees included in retirement incentives are susceptible to a different form of discrimination than are employees who are excluded from retirement incentives. The following section discusses the controls needed to protect both included and excluded employees.

III. INCLUDED V. EXCLUDED EMPLOYEES

A. *Demonstrating a Prima Facie Case*

In order to understand the position of the employee offered a retirement incentive, it is necessary to discuss briefly the elements of a prima facie age discrimination case. When employees claim that they have been wrongfully terminated because of their age, they may use two methods to prove discrimination.¹⁴⁰ First, a plaintiff occasionally can show direct evidence of discrimination. For example, if the employer maintains a written policy requiring all employees to retire at age 60, this policy is a facial violation of the ADEA.¹⁴¹ Unless the employer can show that the policy falls within one of the Act's affirmative defenses, the employer will be held liable.¹⁴² With direct evidence, such as a written policy, there are no ambiguous facts from which the fact finder must draw inferences. As noted above, however, retirement incentives should not be presumptively invalid and consequently should not be deemed direct evidence of age discrimination.¹⁴³

Absent direct evidence of age discrimination, a plaintiff must show facts underlying his or her termination from which the fact finder may infer age discrimination. In determining what constitutes a prima facie case of age discrimination, courts are heavily

¹⁴⁰ See Eglit, *supra* note 49, at 165-77.

¹⁴¹ *Trans World Airlines v. Thurston*, 469 U.S. 111, 121 (1985).

¹⁴² See *Trans World Airlines v. Thurston*, 469 U.S. 111, 124-25 (1985) (airline policy requiring pilots to retire at age 60 directly violated ADEA, court must evaluate validity of affirmative defenses). See Eglit, *supra* note 49, at 170-72.

¹⁴³ See *supra* notes 93-139 and accompanying text.

influenced by decisions under Title VII¹⁴⁴ — the statute that prohibits discrimination on the basis of race, color, religion, sex, or national origin — and uses language very similar to the ADEA.¹⁴⁵ At a minimum, the plaintiff must show that he or she was within the protected class (age 40 or over) and was qualified to remain employed but was nonetheless discharged.¹⁴⁶ In addition, many courts require supplemental evidence from which a fact finder could conclude that age was a motivating factor in the employer's decision to discharge the plaintiff.¹⁴⁷ Certain courts also require some showing that a younger employee assumed some or all of plaintiff's duties.¹⁴⁸

B. *Included Employees*

Not only does the ADEA's language require that the employer's conduct be motivated by age, the employee must also demonstrate that the employer "discriminated against" him or her.¹⁴⁹ The formulations of the prima facie case all focus on causation and permit the fact finder to infer that the employer has taken the adverse action *because of age*. Because in most circumstances it is evident that the employer took adverse action, courts have not expressly articulated a requirement that the plaintiff be "discriminated

¹⁴⁴ Compare the ADEA, 29 U.S.C. §§ 621 *et seq.* (1982 & Supp. III 1985) with Title VII, 42 U.S.C. § 2000e-2(a)(1), which provides:

(a) It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . .

Id.

42 U.S.C. § 2000e-2(a)(2) prohibits employers from segregating employees or applicants in any way that would deprive the individual of employment opportunities or otherwise adversely affect the employee's status because of the employee's race, color, religion, sex, or national origin. *Id.* The ADEA includes a parallel provision. See 29 U.S.C. § 623(a)(2) (1982).

¹⁴⁵ Cases that established the elements of a Title VII prima facie case arose in hiring contexts. See, e.g., *McDonnell Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

¹⁴⁶ *Massarsky v. General Motors Corp.*, 706 F.2d 111, 118 (3d Cir.), *cert. denied*, 464 U.S. 937 (1983). See generally 2 H. EGLIT, *supra* note 42, § 17.61.

¹⁴⁷ See, e.g., *Allison v. Western Union Tel. Co.*, 680 F.2d 1318, 1321 (11th Cir. 1982); *Williams v. General Motors Corp.*, 656 F.2d 120, 129 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982); *Franci v. Avco Corp.*, *Avco Lycoming Div.*, 538 F. Supp. 250, 256 (D. Conn. 1982).

¹⁴⁸ See, e.g., *Kephart v. Institute of Gas Technology*, 630 F.2d 1217 (7th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981); *Franci*, 538 F. Supp. at 260–61. Whether the plaintiff must show that he or she was replaced by a younger employee depends upon the circumstances. In many cases the defendant has instituted a workforce reduction, in which case the ADEA plaintiff will not be replaced at all. In these circumstances courts reasonably have concluded that it is not necessary for the plaintiff to prove that a younger employee assumed his or her position. See, e.g., 2 H. EGLIT, *supra* note 42, § 17.61. In corporate reorganization cases a plaintiff may be required to show that a younger employee performing similar tasks at a similar level was retained. See, e.g., *Syvocek v. Milwaukee Boiler Mfg.*, 665 F.2d 149, 152–54 (7th Cir. 1981); *Pirone v. Home Ins. Co.*, 559 F. Supp. 306, 309 (S.D.N.Y. 1983); *Kahn v. Pepsi Cola Bottling Group*, 547 F. Supp. 736, 739 (E.D.N.Y. 1982); *Goff v. Eastern Associated Coal Corp.*, 29 Fair Empl. Prac. Cas. (BNA) 1831, 1835 (S.D.E.W.Va. 1981), *aff'd mem.*, 679 F.2d 881 (4th Cir. 1982). See generally 2 H. EGLIT, *supra* note 42, § 17.60.

¹⁴⁹ This element is similar to requiring damages in tort suits. Defendant may have had a duty and breached it, but so long as it caused no damage, there is no liability. W. PROSSER, PROSSER ON TORTS § 30 (5th ed. 1984).

against" as an element of a prima facie case. Nonetheless, discrimination against the plaintiff is an essential element of plaintiff's case.

An employer's mere offer of an incentive to retire and an employee's acceptance is not, in isolation, evidence that the plaintiff has been "discriminated against." So long as the option is truly voluntary, the retirement incentive enhances the employee's options. Because many employees wish to retire,¹⁵⁰ courts cannot infer that an employee's retirement is evidence of harm. As the Seventh Circuit Court of Appeals noted in *Henn v. National Geographic Society*, "[w]hen one option makes the recipient better off, and the other is the status quo, then the offer is beneficial."¹⁵¹ Consequently, an employee who accepts an early retirement incentive cannot establish a prima facie age discrimination claim simply by demonstrating that the retirement incentives exist. The employer need not rely on a section 4(f)(2) defense because the included employee has not demonstrated a prima facie case of age discrimination.¹⁵²

Employees who accept early retirement plans, however, may establish an ADEA violation by showing underlying facts and circumstances that raise a factual issue regarding whether the employer's actions made the employee's choice involuntary. The most common method litigants use to raise the issue of involuntary termination is the doctrine of "constructive discharge."¹⁵³

1. Voluntariness and Constructive Discharge

In employment law, courts recognize that an employer can manipulate the terms and conditions of employment and make them so unpleasant that an employee resigns. At first glance, the resignation may appear voluntary but a realistic appraisal of the circumstances surrounding the resignation may show that the employer unlawfully pressured the employee into resigning. This is known as "constructive discharge."¹⁵⁴ Constructive discharge exists when "a reasonable person in the employee's position would have felt compelled to resign."¹⁵⁵ In addition, a few courts also require the employee to demonstrate that the employer had specific intent to coerce the resignation.¹⁵⁶ This

¹⁵⁰ See *supra* notes 101-08 and accompanying text.

¹⁵¹ 819 F.2d 824, 826 (7th Cir. 1987).

¹⁵² *Id.* at 826-27.

¹⁵³ See *infra* notes 154-86 and accompanying text for a discussion of "constructive discharge." Filing the age discrimination suit is one way to demonstrate that the plaintiff did not desire the result. Merely filing the lawsuit, however, cannot be the basis for concluding that plaintiff must have suffered a result he or she did not want at the time. A plaintiff might well decide to retire, but be less satisfied with retirement than hoped.

¹⁵⁴ See generally *Anderson v. Montgomery Ward & Co.*, 650 F. Supp. 1480, 1484-86 (N.D. Ill. 1987); Comment, *Constructive Discharge Under Title VII and the ADEA*, 53 U. CHI. L. REV. 561 (1986); Note, *Choosing a Standard for Constructive Discharge In Title VII Litigation*, 71 CORNELL L. REV. 587 (1986) [hereinafter Note, *Constructive Discharge*].

¹⁵⁵ *Downey v. Southern Natural Gas Co.*, 649 F.2d 302, 305 (5th Cir. 1981). In *Downey* the plaintiff alleged that he took early retirement after his superior advised him that he might be discharged and lose certain benefits. *Id.* The court found that "[a] reasonable person might well feel compelled to resign in the face of such a statement." *Id.* See Note, *Constructive Discharge, supra* note 154, at 588 & nn.6-13.

¹⁵⁶ See, e.g., *EEOC v. Federal Reserve Bank*, 698 F.2d 633, 672 (4th Cir. 1983) (Title VII); *Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1256 (8th Cir. 1981) (Title VII); *Muller v. United States Steel Corp.*, 509 F.2d 923, 929 (10th Cir. 1975) (Title VII). Because the dividing line between legal and illegal retirement "offers" under the ADEA is whether the employee's acceptance was

definition of constructive discharge helps to define involuntariness, but fails to give sufficient guidelines to allow a court to determine when an employee's acceptance of a retirement incentive is involuntary.¹⁵⁷

When making a decision whether to retire, an employee must weigh the advantages and disadvantages of staying employed against the advantages and disadvantages of accepting the retirement option. With retirement incentives, the employer can constructively discharge an employee in two ways. First, the employer can manipulate the retirement offer to make it facially more attractive than it would be with careful consideration. Second, the employer can manipulate the terms and conditions of employment to make the alternative of staying employed unattractive. Either type of manipulation is likely to cause the employee to elect retirement.

If the employer offers the incentive in a manner that precludes the employee from carefully considering the option, the employee faces considerable pressure to accept the incentive. The employee's voluntariness is undermined not because the employer has made employment unattractive, but because the employer has made the incentive offer more attractive than it might be if the employee had an opportunity to review it carefully. In these circumstances, courts determine whether there is duress or coercion, as with all factors that make up voluntariness, by the totality of the circumstances. If the employee has the opportunity to make a measured decision and to consider carefully what is in his or her best interest, then the employer has made a true option available to the employee. Particularly if the employee takes time to consider the offer¹⁵⁸ or consults with an attorney or financial advisor¹⁵⁹ there is evidence of lack of coercion.

The ADEA's goal, however, is not to protect the employee from difficult choices but rather to protect the employee from unlawful choices. Consequently, constructive discharge must involve more than proof that the offer was a good deal or that the decision was difficult to make.¹⁶⁰ A reasonable, prudent, risk-adverse person might decide to accept a "sure thing." The essence of bargaining, however, is that the parties exchange consideration.¹⁶¹ Consequently, an employee's need or desire for the benefits offered, in

voluntary, in this context the "reasonable prudent employee" standard, which focuses on the plaintiff, should apply. Even if a court requires the employer to have specific intent this standard is easily satisfied by the fact that the employer offers incentives to encourage the employee to retire.

¹⁵⁷ The distinction between "voluntary" and "involuntary" has puzzled philosophers for centuries and this discussion does not attempt to resolve the philosophical problems. Rather, this discussion is intended to contribute to the case-by-case development of constructive discharge analysis.

¹⁵⁸ See, e.g., *Paolillo v. Dresser Indus., Inc.*, 821 F.2d 81, 84 (2d Cir. 1987) (employees must be given a reasonable time to reflect and to weigh their options); *Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66, 69-70 (6th Cir. 1982) (plaintiff took four weeks to consider plan before signing). Cf. *Henn v. National Geographic Soc'y*, 819 F.2d 824, 828-29 (7th Cir. 1987) (brevity of time in which to make a decision does not make a choice involuntary, but may show that a person could not digest the information necessary to make the decision).

¹⁵⁹ See, e.g., *Lancaster v. Buerkle Buick Honda Co.*, 39 Fair Empl. Prac. Cas. (BNA) 721, 721 (D. Minn. 1985).

¹⁶⁰ See *Henn*, 819 F.2d at 826 ("That the benefits may overwhelm the recipient and dictate the choice cannot be dispositive. The question 'Would you prefer \$100,000 to \$500,000?' would elicit the same answer from everyone, but it does not on that account produce an 'involuntary' response.").

¹⁶¹ Although few employees have equal bargaining power with their employers, inequality of bargaining power cannot *alone* be enough to vitiate a contract. The relationship between a prosecutor and criminal defendant is hardly one of the parties bargaining with equal strength, yet the rela-

itself, is not enough to show coercion or lack of voluntariness.¹⁶² If need or desire were sufficient to show involuntariness, the more generous the retirement incentives, the more likely the plaintiff could show a constructive discharge.¹⁶³ This bizarre result would serve neither the interests of the employees nor the employers.

An employee's decision to retire will also be affected by his or her perception of the advantages and disadvantages of staying employed. Many factors in the employee's analysis may be extrinsic to both the employer and employee. For example, a recession might have caused a slump in business, or new technology or increased foreign competition might have made the business less profitable. The employer may elect to reduce the workforce by offering retirement incentives prior to layoffs. It is likely that no unlawful age discriminatory acts entered into these factors. Consequently, even though an employee might feel compelled to accept a retirement offer because of the uncertainty of future employment, the employee's acceptance should not be deemed involuntary.

Similarly, courts should not deem pressures extrinsic to the employer, but not to the employee, sufficient to show constructive discharge. For example, if an employee is seriously ill and receives a retirement incentive, that employee might feel that the only reasonable thing to do is to accept the offer. This acceptance, however, should not constitute constructive discharge. In other words, it must be the employer's acts, rather than independent circumstances or external pressures surrounding the employee, that coerce the "reasonable, prudent employee" to accept a retirement offer in order to constitute constructive discharge.¹⁶⁴

Defining constructive discharge becomes more difficult when courts must consider factors that may be extrinsic to the employee but not the employer. For example, poor upper management business decisions may have caused a business slump, resulting in impending layoffs in the employee's department. Again, the employer has probably not acted unlawfully in violation of the ADEA; it is safe to presume that an employer will not sabotage a business enterprise just to eliminate a segment of the workforce. Absent proof that this has occurred, a court cannot infer age discrimination from the fact that a business fails and workers are laid off. Yet, whatever the cause of the business slump,

tionship does not render a criminal plea bargain involuntary. *Brady v. United States*, 397 U.S. 742, 750-55 (1970).

¹⁶² *Inland Empire Builders, Inc. v. United States*, 424 F.2d 1370, 1377 (Ct. Cl. 1970) (quoting *Fruhauf Southwest Garment Co. v. United States*, 111 F. Supp. 945, 951 (Ct. Cl. 1953)); *W.R. Grimshaw Co. v. Nevil C. Withrow Co.*, 248 F.2d 896, 904 (8th Cir. 1957), *cert. denied*, 356 U.S. 912 (1958). *Cf. Coral Gables Imported Motorcars, Inc. v. Fiat Motors*, 673 F.2d 1234, 1239, *modified* 680 F.2d 105 (11th Cir. 1982) (construing New York law), *cert. denied*, 459 U.S. 1104 (1973).

¹⁶³ *See Henn*, 819 F.2d at 824.

¹⁶⁴ Even if the employer seeks to take advantage of the employee's illness by offering the incentive to retire, the employee is better off with the *option* of the incentive retirement. So long as the employee can assess the advantages and disadvantages of leaving, and so long as the employee is not treated adversely because of his or her age or his or her decision to turn down the incentive, the employer's motive should not determine whether the law allows the option. For example, two manufacturers offer incentives to retire. One employer is motivated by a need to reduce the workforce by 25%, the other by a desire to purge the company of "old foggies." Older employees at both companies are contemplating retirement. If motives were the dispositive variable, one employee will get the benefit of the added money, the second will be denied that option by operation of law. In other words, so long as the option is truly voluntary, to disallow incentives punishes the employees as much as it would the employer. Motive should be a factor, however, in determining on what grounds an older employee may be *excluded* from a retirement incentive.

the employee is likely to feel significant pressure to accept a retirement offer. Pressure in this context again should not be sufficient to demonstrate a constructive discharge.

In contrast to the difficult situations presented above, the clearest case of constructive discharge is shown where the employer manipulates the employee's day-to-day work conditions because of age. When the employer's acts would independently violate the ADEA, a constructive discharge occurs. As the Seventh Circuit reasoned in *Henn v. National Geographic*, "[i]f the terms on which [the employees] remained [employed] were themselves violations of the ADEA, then taking the offer of early retirement was making the best of things, a form of minimization of damages."¹⁶⁵ If the employer places economic pressure on the employee, such as demoting the employee or lowering the employee's salary because of the employee's age, this would be sufficient to show constructive discharge.¹⁶⁶ Constructive discharge is appropriately found, for example, when the employer gives the older employees a choice of early retirement or termination, yet younger employees are also given the opportunity to transfer,¹⁶⁷ or where an employee has previously been denied a promotion or raise,¹⁶⁸ or received a significant reduction in work duties,¹⁶⁹ or was transferred to an inferior sales territory¹⁷⁰ and these conditions were not imposed upon younger, similarly-situated employees. In these examples the older employee is subject to adverse employment conditions because of his or her age.

Age discrimination is also demonstrated in much more subtle ways than the examples noted above. An employee might reasonably wish to have his or her supervisor's advice concerning whether to accept the retirement incentive. A supervisor might tell the employee that he or she has no future with the employer. The supervisor's assessment might be an honest, merit-based statement that the employee reasonably should consider in deciding whether to accept the retirement incentive. That assessment, however, also might be motivated by age animus or the supervisor's perception that older employees should retire to open up opportunities for younger employees. If age stereotypes motivate the supervisor's advice, then the employee's choice has been skewed by age bias,

¹⁶⁵ *Henn*, 819 F.2d at 829. The *Henn* court used too stringent a standard for constructive discharge. At the end of its opinion the court concluded that "[t]he reasonable inferences from this record would not allow a jury to infer that the plaintiffs would have been fired [in violation of the ADEA] had they turned down the offer of early retirement, and without such a constructive discharge they cannot undo their choice to retire." *Id.* at 830. Constructive discharge should not require proof that the plaintiffs would have been fired if they had remained. The goal of the constructive discharge doctrine is to reach sophisticated employers who recognize that they cannot fire an employee outright because of the employee's protected status. This employer may never intend to fire the employee, but only to make life so intolerable that the employee will leave of his or her own accord. The Seventh Circuit recognized this problem in *Karlen v. City Colleges of Chicago*, No. 87-1051 (7th Cir. Jan. 12, 1988) (available Feb. 14, 1988, on LEXIS, Genfed library, Courts file).

¹⁶⁶ See, e.g., *Lancaster v. Buerkle Buick Honda Co.*, 39 Fair Empl. Prac. Cas. (BNA) 721, 722-23 (D. Minn. 1985), and cases cited therein.

¹⁶⁷ See, e.g., *Tribble v. Westinghouse Elec. Corp.*, 669 F.2d 1193, 1195 (8th Cir. 1982), cert. denied, 460 U.S. 1080 (1983) (employee applied for a number of open positions, all of which were given to younger employees).

¹⁶⁸ See, e.g., *Reussow v. Eddington*, 483 F. Supp. 739, 742-44 (D. Colo. 1980); *EEOC v. Hay Assocs.*, 545 F. Supp. 1064, 1086-87 (E.D. Pa. 1982).

¹⁶⁹ See, e.g., *Scott v. OCE Indus., Inc.*, 536 F. Supp. 141, 145 (N.D. Ill. 1982).

¹⁷⁰ *Goss v. Exxon Office Sys. Co.*, 747 F.2d 885, 888 (3d Cir. 1984) (transfer to inferior sales territory).

a factor that the ADEA explicitly proscribes.¹⁷¹ The goal of any constructive discharge doctrine is to divide such prohibited age-biased considerations from acceptable non-age factors.

Absent additional discovery, however, it will often be difficult to show that by merely giving specific advice an employer has violated the ADEA. Consequently, when dealing with retirement incentives courts should hold that an employee has articulated a *prima facie* ADEA case when he or she alleges that the defendant employer offered the employee an incentive to retire, specifically advised the employee to accept the offer, that this advice was motivated by age animus, and as a result of that advice the employee accepted the incentive.¹⁷² For example, if an employee alleges that she was offered an incentive to retire, that her supervisor came to her and painted a bleak picture of her future with the company and hinted broadly that her position was tenuous, few employees would risk not accepting the incentive to retire. If the employee believes in good faith that age animus motivated the advice, and makes that allegation in her complaint, this should be sufficient to raise a factual issue about whether her acceptance was voluntary.¹⁷³ If certain employees are singled out and encouraged to reject the incentive, however, those employees cannot show a constructive discharge if they elect to accept the incentive. If the employer encourages the employee to stay employed, and the employee nonetheless retires, the reasonable inference is that the employee wished to voluntarily retire, and that act is fully consistent with the ADEA. Employees whom the employer simply ignores, even though other employees were encouraged to stay, present a more problematic case. Again, only additional information will show whether an employer's age bias was a factor in the employer's failure to encourage these employees to reject the incentive offer.

2. The Consequence of Showing Constructive Discharge

Once a plaintiff shows facts from which a court may infer constructive discharge, the burden shifts to the defendant to articulate a non-age based reason for the action.¹⁷⁴ If the employer produces evidence that its actions or advice were not based on age, then the burden of persuasion shifts back to plaintiff to persuade the fact-finder that age was a factor in the employer's advice, and that but for the advice the plaintiff would not

¹⁷¹ An employer's pressure on all employees may not constitute a constructive discharge, but simply a difficult choice. If the plaintiff shows only that business was declining and that pressure was placed on all salespersons to increase output, for example, these facts are insufficient to raise an inference of constructive discharge. A reasonable employee might well feel it advantageous to accept an incentive retirement rather than remain in that work environment, but the factfinder cannot infer that these non-incentive pressures were age related. If, however, the plaintiff also showed that he or she received harsher evaluations than similarly-situated younger employees, a factfinder could infer that a reasonable person would have felt compelled to accept the incentive program because of the employer's age-related acts, even though these actions do not directly relate to the incentive program. The court should find an ADEA violation on these facts even if no retirement incentive were involved. A violation in conjunction with a retirement incentive is simply a factor to consider in structuring the plaintiff's remedy.

¹⁷² Pleading a *prima facie* case in this context is subject to the same limitations as any lawsuit in federal court. See FED. R. CIV. P. 11 (attorney or party signature constitutes that "to the best of his [or her] knowledge, information, and belief formed after reasonable inquiry [the pleading] is well grounded in fact . . .").

¹⁷³ *Id.*

¹⁷⁴ See, e.g., *Tice v. Lampert Yards, Inc.*, 761 F.2d 1210, 1212-13 (7th Cir. 1985).

have accepted the incentive.¹⁷⁵ The employer will generally attempt to show that the termination¹⁷⁶ was based on reasonable factors other than age.¹⁷⁷ For example, the employee's future with the employer may be limited because of his or her poor performance, not because of age. In that case, the fact that the employer offered the employee retirement incentives in addition to the option of regular termination does not violate the ADEA.¹⁷⁸ Consequently, if the employer had good cause to terminate the employee, or change the employee's duties, or transfer the employee to an inferior position, the fact that the employer also offered the employee an early retirement option should not create liability under the ADEA.¹⁷⁹ For example, in *Toussant v. Ford Motor Company*, the employee claimed that he accepted an early retirement incentive only because the employer discriminatorily eliminated his position.¹⁸⁰ Although the court recognized that an employee in similar circumstances might have felt compelled to resign because of the job elimination, the court found no constructive discharge because it determined that the employer eliminated the job not because of age discrimination but because of "economic realities."¹⁸¹ The court concluded that the plaintiff made a "studied choice" that was "the preferred way out of a difficult situation."¹⁸²

The great practical danger of early retirement incentive programs is that they are often administered in ways that raise a factual inference of constructive discharge. A supervisor, motivated by sincere concern for the employee, will often encourage an employee to accept an early retirement offer.¹⁸³ Once a court concludes that an issue of fact exists concerning whether the employee was constructively discharged, summary judgment becomes impossible.¹⁸⁴ The case will then go to a jury, if a jury trial is demanded, and a jury is likely to look carefully at whether the employer treated the employee fairly, rather than looking solely at the narrow question of whether any unfairness was based on age discrimination.¹⁸⁵ Consequently, although employers may in theory lawfully both offer retirement incentives and encourage certain employees to accept or reject them, that course of conduct is extremely risky if the employer wants to avoid any legal complications.

¹⁷⁵ *Id.*

¹⁷⁶ Termination in this context means that the early retirement offer was made in circumstances that indicate that the acceptance was not voluntary.

¹⁷⁷ See Eglit, *supra* note 49.

¹⁷⁸ See *infra* notes 179–83.

¹⁷⁹ See, e.g., *Sutton v. Atlantic Richfield Co.*, 646 F.2d 407, 410–12 (9th Cir. 1981). The primary difficulty with the concept of constructive discharge is that an employer lawfully may act in a nasty manner, so long as he or she is not nasty because of the employee's age. This can be called the "equal [jerk] defense" — the employer was nasty to everyone on a neutral basis. This theoretically useful defense may not be successful in practice because age discrimination suits are tried to a jury. Despite the judge's charge, when deciding liability, juries are more likely to look at the underlying fairness of the employer's conduct than at any lack of disparity in the employer's conduct.

¹⁸⁰ 582 F.2d 812, 816 (10th Cir. 1978).

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ See *Saltzman v. Fullerton Metals Co.*, 661 F.2d 647, 650 (7th Cir. 1981) ("perhaps you ought to look for work elsewhere" and "maybe you'd better leave").

¹⁸⁴ See, e.g., FED. R. CIV. P. 56(c) (summary judgment may be rendered when the moving party shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law").

¹⁸⁵ See *supra* note 179.

In a purely objective world, employees should have the maximum amount of information possible before making a decision whether to accept a retirement incentive. Ironically, in order to reduce the chance of going to trial on an age discrimination claim, employers may withhold job performance information from employees during the period the retirement incentive offer is made. If an employer has followed good personnel practices by giving honest and periodic evaluations, the employee will be aware of his or her employment status. If the employer has not kept employees accurately informed of their performance, many employees will actively seek their supervisor's advice concerning their employment status. Unfortunately, structuring the ADEA essentially to encourage employers to withhold this information may be a necessary cost in order to properly protect employees under the ADEA. If specific advice were not sufficient to raise a factual inference of constructive discharge,¹⁸⁶ it would be almost impossible for courts to monitor employer pressure and guarantee that employers do not use retirement incentives as an indirect method of implementing mandatory retirement.

If the plaintiff demonstrates a *prima facie* case of constructive discharge which the defendant fails to rebut, a section 4(f)(2) defense — that the incentive is a bona fide employee benefit plan and not a subterfuge to evade the ADEA — is not available to the defendant. Section 4(f)(2) may not be used to “require or permit the involuntary retirement” of an individual. If the fact finder concludes that a constructive discharge has occurred, the retirement was involuntary and by its terms the section 4(f)(2) defense is inapplicable. If the fact finder concludes that no constructive discharge occurred, then the retirement was voluntary and there was no ADEA violation.

C. *Excluded Employees and Variable Benefits*

In order to understand the interests of excluded employees and employees offered fewer benefits, it is necessary to revisit the definition of the protected class under the ADEA. Employees under the age of 40 who are excluded from a retirement incentive plan have no standing to challenge their exclusion because they are not protected by the ADEA.¹⁸⁷ Once an employee reaches the magical age of 40, however, the ADEA's protections apply with full force. If an employer offers an incentive plan under identical terms to all employees over 40 years old, the ADEA is not violated because employees are not subject to different terms or conditions of employment because of age.¹⁸⁸ Any

¹⁸⁶ Specific advice must be coupled with the plaintiff's allegation that age animus motivated the advice.

¹⁸⁷ Consequently, employers can discriminate against employees under 40 because of their age without fear of legal repercussions. Employees under 40 may, however, receive incidental relief. The EEOC regulations allow the EEOC to receive any “complaints” of discrimination. 29 C.F.R. § 1626.5 (1987). A worker under age 40 may send a letter of complaint and if the practice complained of also affects workers over 40, the EEOC may institute its own inquiry. If a 37-year old applicant is denied a position as a firefighter because a city only accepts applicants under the age of 35, for example, the EEOC may challenge the policy because it also affects persons within the protected class. If the EEOC cooperates with the complainant, the remedial decree may require the city to abandon its policy and reconsider *all* persons previously denied a position because of that policy. In this way, the worker under 40 receives a remedy.

¹⁸⁸ See, e.g., *Empl. Prac. Dec.* (CCH) 29 C.F.R. § 1625.10(a)(2) (1987) (“Where an employer under an employee benefit plan provides the same level of benefits to older workers as to younger workers, there is no violation of section 4(a), and accordingly the practice does not have to be justified under section 4(f)(2).”).

distinctions between a 40 year old and a 70 year old based solely on age, however, raises age discrimination problems.¹⁸⁹ The employee is no longer being given a benefit "based on ability rather than age."¹⁹⁰ Although logically one might argue that the problems of age discrimination intensify as one grows older, and therefore greater protection accrues as the employee advances within the protected class, nothing in the ADEA's general prohibitions provides for such a differentiation.¹⁹¹ Rather, intra-class distinctions must be justified under section 4(f)(2).¹⁹² Consequently, an employer can make age-based distinctions if those distinctions meet the requirements of section 4(f)(2), which allows an employer "to observe the terms of a bona fide seniority system or bona fide employee benefit plan . . . which is not a subterfuge to evade the purposes of the ADEA."¹⁹³

1. Meeting the Requirements of Section 4(f)(2)

Section 4(f)(2)'s language clearly acts as an exception to the ADEA's general prohibitions. This exception is cumbersome to interpret because words such as "bona fide," "subterfuge," and "employee benefit plan" are not precisely defined. In addition, there is little legislative history to help determine the scope of this exception.¹⁹⁴ Consequently, the meaning of section 4(f)(2) is determined largely by logical inferences drawn by examining its words in the context of the ADEA as a whole.

¹⁸⁹ The EEOC interpretive regulations expressly provide that it is unlawful to prefer a 52-year old to a 42-year old, or vice versa, solely because of age. 29 C.F.R. § 1625.2(a) (1987).

¹⁹⁰ 29 U.S.C. § 621(b) (1982).

¹⁹¹ See H.R. REP. NO. 805, *supra* note 2, at 2219 (age 40 selected because that is the age at which age discrimination in employment "becomes evident"). Yet one express purpose of the ADEA is "to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b) (1982). Other benefits that would meet problems arising out of the impact of age on employment might also call for intragroup distinctions. Recognizing this fact, the EEOC interpretations of the ADEA provide that:

The extension of additional benefits, such as increased severance pay, to older employees within the protected age bracket may be lawful if an employer has a reasonable basis to conclude that those benefits will counteract problems related to age discrimination. The extension of those additional benefits may not be used as a means to accomplish practices otherwise prohibited by the Act.

29 C.F.R. § 1625.2(b) (1987). Although Congress designated workers over age 40 as the protected class, the problems confronting various age groups within the class are not equal. The ADEA does not, however, expressly authorize affirmative action programs for the elderly. Although this reasonable statement in the regulations above comports with the ADEA's purposes, nothing in the Act provides expressly for enhanced severance benefits because of age. In order to be valid, such a program would have to fall within the § 4(f)(2) exemption or be either a reasonable factor other than age or a bona fide occupational qualification. The validity of enhanced severance benefits because of advanced age is outside the scope of this Article, although the conclusions drawn herein would aid in analyzing such benefits. See *generally* General Elec. Co. v. Gilbert, 429 U.S. 125, 141 (1976) (Title VII interpretive regulations do not have the force of law because Congress did not confer upon the EEOC authority to promulgate rules or regulations pursuant to Title VII; courts may refer to the interpretations for guidance but need not follow them).

¹⁹² See *United Air Lines v. McMann*, 434 U.S. 192, 207 (1977) (White, J. concurring) ("all retirement plans necessarily make distinctions based on age"); *Zinger v. Blanchette*, 549 F.2d 901, 910 (3d Cir. 1977) ("there is obviously discrimination because of age . . . in any retirement plan, voluntary or involuntary"). See also *Cipriano v. Board of Educ., N. Tonawanda*, 785 F.2d 51 (2d Cir. 1986).

¹⁹³ 29 U.S.C. § 623(f)(2) (1982).

¹⁹⁴ See *supra* notes 231-33 and accompanying text.

a. Employee Benefit Plans

Section 4(f)(2) applies to "any bona fide employee benefit plan such as a retirement, pension, or insurance plan"¹⁹⁵ The terms "retirement" and "pension plan" appear to encompass retirement incentives, particularly because incentives generally are conjoined with a traditional retirement or pension plan.¹⁹⁶ Retirement incentives would also appear to fall logically within section 4(f)(2)'s expansive language, which indicates that other unenumerated plans may also fall within the definition of a "bona fide employee benefit plan."¹⁹⁷ In addition, recently revised EEOC interpretive regulations define an employee benefit plan as "a plan, such as a retirement, pension, or insurance plan, which provides employees with what are frequently referred to as 'fringe benefits.'"¹⁹⁸ Retirement incentives which are not given as a wage for services rendered fall within this definition.¹⁹⁹

The Employee Retirement Income Security Act (ERISA) contains the most comprehensive definition of the phrase "employee benefit plan" and lends further support to including retirement incentives within employee benefit plans.²⁰⁰ Although enacted seven years after the ADEA, ERISA's definitions nonetheless aid interpretation of the ADEA.²⁰¹ Under ERISA, an employee pension benefit plan is defined as any plan, fund, or program that provides retirement income to employees or results in a deferral of income by employees, including income received after termination.²⁰² ERISA's definition applies to any plan regardless of the method used to calculate or distribute the benefits.²⁰³

¹⁹⁵ The definition of an employee benefit plan must include something more than simply giving a benefit. If an "employee benefit plan" means only that a plan "must provide benefits for employees," *see* *Patterson v. Independent School Dist. #709*, 742 F.2d 465, 466 (8th Cir. 1984), then all benefits including wages, would fall within § 4(f)(2)'s meaning. The ADEA prohibits discrimination against any individual with respect to his or her compensation, terms, conditions, or privileges of employment, because of such individual's age. 29 U.S.C. § 623(a) (1982). The traditional rule of statutory construction — that exceptions to remedial legislation should be construed narrowly — applies to the ADEA. *Marshall v. Eastern Airlines, Inc.*, 474 F. Supp. 364, 368 (S.D. Fla. 1979). The ADEA's primary provision, which prohibits discrimination in the terms and conditions of employment would be rendered superfluous if "employee benefit plans" were defined as simply paying benefits. At a minimum, employee benefit plan means pension and benefit plans and presumably certain "welfare" benefits such as life and health insurance. *See* KING, *THE ADEA AND EMPLOYEE BENEFIT PLANS*, IN *ADEA: A SYMPOSIUM HANDBOOK FOR LAWYERS AND PERSONNEL PRACTITIONERS* 317 (1983).

¹⁹⁶ *Cipriano*, 785 F.2d at 54 (incentive to retirement plan "when read as a supplement to an underlying general retirement plan" was "retirement" plan" for § 4(f)(2) purposes).

¹⁹⁷ *Id.* and cases cited herein. The ADEA contains no other provisions that further define what constitutes an employee benefit plan.

¹⁹⁸ 29 C.F.R. § 1625.10(b) (1987) (term does not refer to wages or salary in cash).

¹⁹⁹ *Id.*

²⁰⁰ 29 U.S.C. §§ 1001 *et seq.* (1982 and Supp. III 1985).

²⁰¹ ERISA defines an "employee benefit plan" as an employee welfare plan and/or an employee pension benefit plan. 29 U.S.C. § 1002(3) (1982). An employee welfare plan is defined, roughly, as a plan that provides benefits such as health care, death, disability, scholarship funds, and prepaid legal services. 29 U.S.C. § 1002(1) (1982).

²⁰² 29 U.S.C. § 1002(2)(A) (1982).

²⁰³ *Id.* If a plan, fund, or program is covered by ERISA, it must meet a series of complicated requirements governing disclosure and reporting, Part 1, 29 U.S.C. §§ 1021–31 (1982), participation and vesting, Part 2, 29 U.S.C. §§ 1051–61 (1982), funding, Part 3, 29 U.S.C. §§ 1081–86 (1982), and fiduciary responsibility, Part 4, 29 U.S.C. §§ 1101–14 (1982).

ERISA's broad definition of employee benefit plan includes almost all retirement incentive programs.²⁰⁴ For example, if an employer continues the employee's salary payments or provides him or her with an annuity, such programs constitute ERISA plans because they defer income²⁰⁵ or because they provide retirement income.²⁰⁶ If an employer provides an employee a lump sum severance payment triggered by retirement, under Department of Labor regulations, that too falls under ERISA.²⁰⁷

Although Congress could not refer to ERISA in 1967 when it first drafted section 4(f)(2), ERISA was available when Congress enacted the 1978 ADEA amendments. The Senate Report accompanying the 1978 Amendments directly addressed the effect of raising the ADEA's upper age limit on ERISA, and reflected Congress's desire to reconcile the two statutes.²⁰⁸ ERISA also contains many age-based requirements, including designating age 65 as "normal retirement age" and the age at which benefits are determined.²⁰⁹ In order to prevent inconsistencies between ERISA and the ADEA, the ADEA's definition of bona fide employee benefit plans must be at least coextensive with ERISA. Because ERISA is the most comprehensive regulatory statute governing pension plans and because section 4(f)(2) relates to and saves ERISA from being inconsistent with the ADEA, it is reasonable to assume that by using the phrase "employee benefit plan" in both statutes Congress at a minimum meant to reconcile the two statutes.²¹⁰

²⁰⁴ An incentive to resign program not strictly tied to retirement, and consequently available to employees of all ages, might be deemed an employee welfare benefit plan under ERISA. *See* 29 U.S.C. § 1002(1) (1982).

²⁰⁵ 29 U.S.C. § 1002(2)(A)(ii) (1982).

²⁰⁶ *Id.* § 1002(2)(A)(i) (1982).

²⁰⁷ 29 C.F.R. § 2510.3-2(b) (1987).

²⁰⁸ S. REP. NO. 493, *supra* note 58, at 508. The Report includes a letter from the Assistant Secretary of Labor for Employment Standards, Donald Elisburg, in which he concluded that raising the ADEA's upper age limit would not interfere with ERISA's relevant provisions. *Id.* Congress's awareness of ERISA and its desire to reconcile the two statutes supports looking to ERISA for assistance in defining the term "employee benefit plan" under the ADEA. ERISA's goals are distinct from, but nonetheless related to, the ADEA. ERISA's purpose is to protect employee's interests in pensions by regulating participation, vesting, and disclosure. One statutory goal is to prevent long service employees from losing anticipated retirement benefits due to lack of vesting or financial failure of the plans. 29 U.S.C. § 1001(a) (1982). *See also* Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 730 (1984); *Pompano v. Michael Schiavone & Sons, Inc.*, 680 F.2d 911, 941 (2d Cir.), *cert. denied*, 459 U.S. 1039 (1982). Although Congress enacted ERISA in order to achieve greater fairness for employees, ERISA itself contains many age-based restrictions. Under ERISA, for example, an employee need not be included in certain benefit plans if the employee begins employment within five years of the plan's normal retirement age. 29 U.S.C. § 1052, (1982). *See also* Note, *Interpreting Section 4(f)(2) of the ADEA: Does Anyone Have a "Plan?"*, 135 U. PA. L. REV. 1055 (1987).

²⁰⁹ 29 U.S.C. § 1056(a) (1982). The Senate Report accompanying the ADEA expressly stated that the ADEA "would not change the definition of normal retirement age under ERISA." S. REP. NO. 493, *supra* note 58, at 508. Any ERISA provisions affecting employees over age 40 because of the employee's age would have been unlawful if judged solely by the ADEA's general prohibition. If the § 4(f)(2) exception was intended to prevent the ERISA provisions concerning normal retirement age and benefits accrual from conflicting with the ADEA, it is logical to infer that the § 4(f)(2) exception was also intended to protect those ERISA provisions not directly at issue in the 1978 Amendments.

²¹⁰ A standard rule of statutory construction is that statutes should be interpreted *in pari material*, so that one is not found inconsistent with another. N. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 51.10 (4th ed. 1984). In addition, the last statute passed is deemed to prevail. *Id.* at § 51.02.

ERISA's definition should therefore carry significant weight in interpreting section 4(f)(2).²¹¹

Concluding that retirement incentives come within the ADEA's definition of "employee benefit plan" advances but does not end the inquiry. Section 4(f)(2) is further limited by requiring that employee benefit plans be both "bona fide" and "not a subterfuge" to evade the purposes of the Act.²¹² These two qualifying phrases, particularly the latter, serve to regulate *how* an employer may provide retirement incentives. As a matter of statutory construction, courts usually should not infer that two words used in the same sentence have the same meaning because this interpretation renders one of the phrases redundant. Both "bona fide" and "not a subterfuge," however, are fluid terms and are vague enough to incorporate any number of ideas. Certainly the use of two separate phrases emphasizes that Congress intended to allow courts to monitor carefully section 4(f)(2) so that it not become a vehicle for excusing arbitrary age discrimination.

i. Bona Fide Plans

In its lexical meaning, bona fide means true, actual, and without simulation or pretense.²¹³ Consistent with this meaning, many courts have held that a bona fide plan under section 4(f)(2), at a minimum, requires the employer both to have an actual plan and to observe the terms of that plan.²¹⁴ In other words, the plan must exist and pay benefits.²¹⁵ Although this point may seem obvious, it serves as an important limitation. For example, an on-the-spot offer to encourage a single employee to retire would not constitute an exception under section 4(f)(2) because it was not part of a bona fide plan.²¹⁶

Because Congress enacted ERISA after the ADEA, it is reasonable to conclude that Congress intended the later statute to be lawful under the ADEA. The Internal Revenue Code contains extensive provisions governing what constitutes a "qualified pension, profit-sharing, and stock bonus" plan to qualify for preferential tax treatment. 29 U.S.C. § 401 (1982). Even if an employer discovers that an incentive program falls outside ERISA, an employer must still be concerned about the tax consequences.

²¹¹ Including retirement incentives within the meaning of "employee benefit plan" also best reconciles the ADEA with the goal of maximizing employee options. Because the ADEA does not prohibit an employee from retiring if the employee so elects, and because retirement is a benefit when voluntarily elected, a voluntary retirement incentive program advances the Act's underlying goals.

²¹² See *EEOC v. Home Ins. Co.*, 672 F.2d 252, 260 (2d Cir. 1982).

²¹³ BLACK'S LAW DICTIONARY 160 (5th ed. 1979).

²¹⁴ See *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 194 & n.2 (1977) (employee conceded that "the plan was bona fide 'in the sense that it exists and pays benefits'"); 29 C.F.R. § 1625.10(b) (1982) (plan is bona fide if its terms have been accurately described in writing to all employees and it provides the benefits described); 2 H. EGLIT, *supra* note 42, § 16.35 n.4 and cases cited therein. Prior to the 1978 Amendments, several courts struck down involuntary early retirement plans on the ground that the plan did not authorize involuntary retirement. *Id.* § 16.34.

²¹⁵ *McMann*, 434 U.S. at 194.

²¹⁶ An individually-tailored offer, however, might well be deemed a settlement of an ongoing dispute or an offer made for reasons other than age. See, e.g., *Sutton v. Atlantic Richfield Co.*, 646 F.2d 407, 410 n.4 (9th Cir. 1981) (extension of extra-contractual benefits to employee who was to be terminated on neutral principles does not violate ADEA). If such an offer is made solely because of the individual's age, however, only § 4(f)(2) would save the offer from violating the ADEA. On the spot offers also carry a far greater likelihood that merely making the offer is coercive.

Bona fide can also be used in a broader sense to mean without deceit or fraud.²¹⁷ Used in this sense, bona fide comes very close to the concept of subterfuge. For example, some courts conclude that a bona fide plan must not only exist and pay benefits, but that the plan's benefits also must be substantial.²¹⁸ Whether analyzed as part of the "subterfuge" or as part of the "bona fide" element, a substantiality requirement serves an important check on retirement incentives. If an employer intentionally underfunds the generally-available retirement plan and offers significant retirement incentives, a court reasonably could infer that the employer's retirement practices as a whole are not bona fide.²¹⁹ Without some requirement of substantiality for the underlying pension, an employer could easily manipulate incentives to place enormous financial pressures on employees to retire. So long as the underlying pension plan provides substantial benefits, however, any additional incentive program should not have any substantiality requirement. The additional incentives are by their nature bonus payments. An extremely small incentive, however, obviously is not likely to attract many acceptors. If many employees accept such an incentive offer, a court is likely to look beyond the plan and inquire if unlawful pressures were placed on the employees.²²⁰

ii. Not a Subterfuge: Distinguishing Arbitrariness

The phrase "not a subterfuge" is difficult to interpret in the context of the ADEA because, unlike race or sex or national origin discrimination, age requirements are usually integral to retirement and pension plans. Consequently, a court could find that an employer has violated the ADEA's policy of no age discrimination merely by offering an age-triggered pension. Yet section 4(f)(2)'s language evinces Congress's intent to protect retirement and pension plans.²²¹ Thus, "subterfuge" must be interpreted in light of this intent to protect traditional retirement benefits.²²² Unfortunately, neither the courts nor the legislative history of the ADEA provide sufficient guidance concerning the meaning of subterfuge in the context of retirement incentives.

The Supreme Court addressed the meaning of subterfuge under section 4(f)(2) in *United Air Lines, Inc. v. McMann*.²²³ In 1978, the *McMann* Court concluded that mandatory retirement under section 4(f)(2) was not a subterfuge to evade the ADEA, at least where — as in *McMann* — the retirement plan was enacted prior to the ADEA's passage in 1967.²²⁴ The Court defined "subterfuge" very narrowly by tying it to "a scheme, plan,

²¹⁷ BLACK'S LAW DICTIONARY 160 (5th ed. 1979).

²¹⁸ See, e.g., *Smart v. Porter Paint Co.*, 630 F.2d 490, 496 (7th Cir. 1980); *McMann*, 434 U.S. at 206–07 (White, J. concurring); 2 H. EGLIT, *supra* note 42, § 16.35 and cases cited therein.

²¹⁹ Cf. *Patterson v. Independent School Dist. #709*, 742 F.2d 465, 466 (8th Cir. 1984) ("[a]n unreasonably infinitesimal benefit would brand the plan as a subterfuge to evade the provisions of the statute"). See also *McMann*, 434 U.S. at 194 & n.2, 203; *EEOC v. Borden's, Inc.*, 724 F.2d 1390, 1395 (9th Cir. 1984); *Smart v. Porter Paint Co.*, 630 F.2d 490, 494 (7th Cir. 1980).

²²⁰ See *supra* notes 154–86 and accompanying text for a discussion of constructive discharge.

²²¹ *McMann*, 434 U.S. at 199–200.

²²² Nothing in the ADEA's language or accompanying reports indicate that the statute was intended to eliminate age as a factor in retirement. The later passage of ERISA, which expressly allows age-triggered benefits, makes clear that the ADEA was not intended to eliminate age as a factor in retirement. See *supra* notes 200–11 for a discussion of the relationship between the ADEA and ERISA.

²²³ 434 U.S. 192 (1977).

²²⁴ *Id.* at 203.

stratagem, or artifice of evasion.”²²⁵ In other words, the Court interpreted “subterfuge” to require specific intent to evade the ADEA. The Court also rejected a “per se” rule requiring an employer to show an economic or business justification for any plans under section 4(f)(2).²²⁶

The *McMann* decision is limited because it examines subterfuge only in the context of retirement plans enacted before 1967.²²⁷ Because most special retirement incentives have been planned, offered, and implemented after the ADEA’s passage, *McMann*’s analysis does not offer a definitive determination that such incentives are not a subterfuge.²²⁸ On the contrary, if taken to its logical conclusion, the *McMann* analysis raises potential problems for retirement incentives. If plans enacted before the ADEA was passed in 1967 are automatically not a subterfuge, then plans amended after 1967 arguably automatically are a subterfuge to evade the ADEA.²²⁹ Such an analysis could label most pension plans as a “subterfuge.” An employer certainly knows that a retirement plan that gives benefits to employees at 65 excludes employees under 65.²³⁰ Yet a plan that begins benefits at age 65 is eminently reasonable when compared to the provisions of Social Security and ERISA. Such an expansive interpretation of section 4(f)(2) would directly contravene Congress’s intent to protect the retirement interests of employees. Yet, if the *McMann* intent requirement means only that the employer had ill will, as the word “artifice” implies, then subterfuge will have a very limited meaning and the ADEA would impose virtually no limits on how an employer structures retirement incentives. Without some limitation, an employer could exclude all employees over a designated age from retirement incentives without any justification.

²²⁵ *Id.* The Court stated:

In ordinary parlance, and in dictionary definitions as well, a subterfuge is a scheme, plan, stratagem, or artifice of evasion. In the context of this statute, “subterfuge” must be given its ordinary meaning and we must assume Congress intended it in that sense. So read, a plan established in 1941, if bona fide, as is conceded here, cannot be a subterfuge to evade an Act passed 26 years later. To spell out an intent in 1941 to evade a statutory requirement not enacted until 1967 attributes, at the very least, a remarkable prescience to the employer. We reject any such per se rule requiring an employer to show an economic or business purpose in order to satisfy the subterfuge language of the Act.

Id.

²²⁶ *Id.*

²²⁷ See, e.g., *McMann*, 434 U.S. at 198 (opinion of the Court), 434 U.S. at 216 (Marshall, J., dissenting); *Zinger*, 549 F.2d at 904–05; *EEOC v. Home Ins. Co.*, 672 F.2d 252, 258–59 (2d Cir. 1982).

²²⁸ See *supra* notes 6–8. When Congress amended § 4(f)(2) to prohibit mandatory retirement, it did not expressly reject the court’s reasoning in *McMann*. This has led at least two courts to conclude that the 1978 amendments did not overrule *McMann* in its entirety. See *Crosland v. Charlotte Eye, Ear, & Throat Hosp.*, 686 F.2d 208, 213 (4th Cir. 1982); *EEOC v. Maine*, 644 F. Supp. 223, 226 (D. Me. 1986). But see H.R. CONF. REP. No. 950, *supra* note 58.

²²⁹ See *EEOC v. Westinghouse Electric Corp.*, 632 F. Supp. 343, 368 (E.D. Pa. 1986) (post-ADEA reaffirmation of prior discriminatory practices amounts to an evasion of the ADEA). The United States Supreme Court has used such reasoning to divine legislative intent. See *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381–82 (1982) (fact that later amendments left intact statutory provisions under which lower federal courts had implied a cause of action is itself evidence that Congress intended to preserve a private right of action).

²³⁰ See Brodin, *The Role of Fault and Motive in Defining Discrimination: The Seniority Question Under Title VII*, 62 N.C. L. REV. 943 (1984).

Section 4(f)(2)'s meager legislative history gives some help in attempting to define "subterfuge." The Congressional Reports indicate that Congress intended to incorporate some sort of business or cost justification within section 4(f)(2). The House Report accompanying the 1967 version of the ADEA referred to section 4(f)(2) briefly, stating that Congress intended that the exception "serves to emphasize the primary purpose of the bill — hiring of older workers — by permitting employment without necessarily including such workers in employee benefit plans."²³¹ The Senate Report accompanying the 1978 ADEA amendments indicated that section 4(f)(2) allows employers to make differentiations based on age due to "increased costs for employee welfare benefit plans such as disability, health, life, and other forms of insurance for employees."²³² In addition, the EEOC also ties subterfuge squarely to cost justifications, concluding that section 4(f)(2)'s purpose is to permit age-based reductions in benefits if they are justified "by significant cost considerations."²³³

The Supreme Court tied subterfuge to intent and rejected a *per se* rule of cost justification. The legislative history and the EEOC equate subterfuge with cost justifications. It is possible to reconcile these various visions of subterfuge by analyzing section 4(f)(2) in the context of the ADEA as a whole. The Act has three stated purposes: (1) to promote employment of older workers based on their ability rather than age; (2) to prohibit arbitrary age discrimination in employment; and (3) to help employers and workers find ways to meet problems arising from the impact of age on employment.²³⁴ Section 4(f)(2) is uniquely suited to achieve the second and third goals. Consistent with the stated purposes of the ADEA, the subterfuge language of 4(f)(2) should be read to exempt those employer practices that are not arbitrary even though based on age and to allow employers to structure benefits to meet the problems arising from the impact of age on employment. The problem, of course, is defining what is "arbitrary."

No single litmus test will determine whether a plan uses arbitrary age factors and is therefore a subterfuge. The better approach is to provide guidelines to employers, but

²³¹ H.R. REP. NO. 805, *supra* note 2, at 2217. In isolation, this language is not consistent with the ADEA. The language of § 4(f)(2) covers only newly hired employees. In addition, the stated purpose is not only to "promote employment of older persons" but also "to prohibit arbitrary age discrimination in employment." 29 U.S.C. § 621(b) (1982). See generally Comment, *Age Discrimination in Private Pension Plans*, 9 SAN FERN. V.L. REV. 67 (1981).

²³² S. REP. NO. 493, *supra* note 58, at 508. See also Hearings on S.830, Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess. 27 (comments of Sen. Javits); Note, *The Cost Defense Under the Age Discrimination in Employment Act*, 1982 DUKE L. J. 580, 589 (surveying legislative history of § 4(f)(2)); Note, *supra* note 208.

²³³ 29 C.F.R. § 1625.10(a)(1) (1987). The EEOC unfortunately has been slow to help courts and litigants ascertain the scope of § 4(f)(2) protection and the role of early retirement under the ADEA. The EEOC failed to issue any new guidelines on § 4(f)(2) for several years, relying instead on Department of Labor interpretations. 44 Fed. Reg. 30658 (1979), as amended at 52 Fed. Reg. 8448 (1987), redesignated and amended at 52 Fed. Reg. 23812 (1987) (codified at 29 C.F.R. § 1625.10 (1987)). Under the regulations, the employer is not required to spend more to give an older employee the same benefits as a younger employee. 29 C.F.R. 1625.10(a)(1) (1987). The employer, however, is required to spend the same amount of money on older employees as on younger. *Id.* Under the interpretations, an employer may reduce benefits to an older worker because of cost only after communicating the reduction to the employees. *Id.* Two methods may be used: (1) a "benefit-by-benefit" approach in which reductions must be justified based on the cost of each benefit, and (2) a "benefit package" approach in which benefits may be lumped together so that a greater reduction may be made in one benefit in order to provide enhanced benefits that might otherwise be cut. *Id.*

²³⁴ See *supra* note 27.

leave courts open to consider new and creative ways in which employers might achieve arbitrary age discrimination. Several distinct characteristics of retirement incentives have sufficient indicia of nonarbitrariness that their use should not be deemed a subterfuge to evade the ADEA. As a preliminary matter, the defendant is always able to rebut the plaintiff's claim by demonstrating that the unequal benefit distribution is not caused by age. If the unequal benefit distribution is caused by age, the defendant should be able to demonstrate that the age-triggered benefit is not a subterfuge if it involves only a minimum eligibility age. Similarly, age should not be a subterfuge if it is designed to achieve equality of result. Finally, the defendant may be able to show significant, demonstrable cost considerations that justify structuring the benefits by age.

First, as a preliminary matter, the defendant may be able to rebut the plaintiff's *prima facie* case by demonstrating that the unequal benefit distribution is not caused by age. Incentives that give increased benefits to employees in proportion to the employee's years of service reward longer service and can appropriately be viewed as a benefit given by seniority or as a reasonable factor other than age and therefore not a subterfuge to evade the ADEA.²³⁵ Similarly, tying enhanced incentives to salary also would be a reasonable factor other than age for structuring the incentive.²³⁶ There may be a disparate impact due to age, but this disparate impact does not support an inference of age discrimination.

Second, the defendant should be able to demonstrate a section 4(f)(2) defense by establishing that the retirement incentive sets a minimum eligibility age for benefits. Setting a minimum eligibility age is the most common age distinction in retirement plans and retirement incentives. In light of both the nature of the harm caused by minimum eligibility ages and the practical necessity for setting minimum ages, courts should not deem a minimum eligibility age as a subterfuge under the ADEA.

Minimum eligibility ages are not the kind of invidious age distinction that caused Congress to pass the ADEA.²³⁷ Rather, minimum eligibility ages allow employers to show a preference for older employees by making age-triggered rewards available to them.²³⁸ It is an age-based distinction within the protected class, but the younger, excluded employees will eventually reach the age where they too may be given age-triggered benefits.²³⁹ Although it does not achieve an age blind goal of having employees judged solely on ability, this age distinction does allow employers to acknowledge that older employees within the protected class indeed have some interests, particularly retirement, distinct from younger employees.

Minimum eligibility ages are also consistent with Social Security and ERISA, both of which allow minimum ages for benefits.²⁴⁰ Since Congress actively sought to reconcile ERISA with the ADEA in the 1978 ADEA amendments, it is only reasonable to conclude that Congress intended that minimum eligibility ages are not a subterfuge to evade the

²³⁵ See *supra* notes 49–51 and accompanying text.

²³⁶ *Id.* See also *Karlen v. City Colleges of Chicago*, 837 F.2d 314, 318 (7th Cir. 1988) (no discrimination in severance retirement incentive where bonus was tied to salary).

²³⁷ See *supra* notes 59–70 and accompanying text.

²³⁸ See, e.g., *Karlen v. City Colleges of Chicago*, 837 F.2d 314, 318 (7th Cir. 1988) (ADEA does not protect younger against older in early retirement plans); *Dorsch v. L. B. Foster Co.*, 782 F.2d 1421, 1427 (7th Cir. 1986).

²³⁹ *Wehrley v. American Motors Sales Corp.*, No. F86-248 (N.S. In. Feb. 12, 1988) (available March 20, 1988, on LEXIS, Genfed library, Dist file).

²⁴⁰ See *supra* notes 93 and 209.

ADEA.²⁴¹ Minimum eligibility ages may also be justified by practical considerations. Making all employees over 40 eligible for retirement incentives would be prohibitively costly and might seriously disrupt a business. For all these reasons, it should be facially reasonable, and therefore protected under section 4(f)(2), for employers to set a minimum eligibility age for retirement incentives.

Defendants also can demonstrate that a plan is not arbitrary, and consequently not a subterfuge to evade the ADEA, if the plan provides unequal benefit distribution in order to achieve equality of result.²⁴² For example, suppose a plan offers variable incentives to all employees over age 55 in a manner that gives employees the same monthly benefits, or some percent of the benefits, that they could obtain at full eligibility for their pension. In this example, the plan is tailored to treat each employee as if he or she were at whatever age triggers full benefits. In this form of plan the employer treats employees differently because of their age, but the differing treatment is designed to allow all employees to reach the same end position of maximum monthly benefits and thus should not violate the ADEA. Plans structured in this way do not deny benefits to older employees that younger employees will receive. Rather, plans structured in this way give younger employees the same benefits, or some percent of the benefits, received by the older employees.

Several analogous situations help illustrate this point. Employers do not unlawfully discriminate when they give all employees the same insurance coverage, even though the cost is higher for older employees. Similarly, employers do not discriminate when they offer to pay for education for employees. Employees who have less education to begin with receive a greater benefit, but the program can be justified on the ground that it seeks to place all employees at the same finishing spot. If, in contrast, an employer offered educational benefits only to employees under the age of 50, the excluded employees have a valid age discrimination claim. In that case older employees cannot achieve the same goal of education as younger employees. Similarly, if an incentive plan offered cash bonuses only to employees age 65 to 70, but denied them to older employees, the older employees are being denied a benefit younger employees receive.²⁴³ Absent an independent justification for structuring the incentive in this manner, section 4(f)(2) should not apply.

Finally, the employer should be able to satisfy section 4(f)(2) by demonstrating significant and readily demonstrable business or cost considerations that justify structuring the benefits to reduce or deny benefits to older employees. Pure cash incentives that

²⁴¹ See *supra* notes 195–211 and accompanying text.

²⁴² See *e.g.*, *Dorsch v. L. B. Foster Co.*, 782 F.2d 1421 (7th Cir. 1986); *Potenze v. New York Shipping Association, Inc.*, 804 F.2d 235 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1955 (1987). *Potenze* is not a completely analogous situation since the underlying benefits were given to guarantee a steady income to workers in a depressed industry. In *Potenze* the Second Circuit held that an employer who offset benefits by Social Security income for employees 65 and over but not for employees 62–65 did not discriminate on the basis of age.

²⁴³ *Contra Patterson v. Independent School Dist. No. 709*, 742 F.2d 465 (8th Cir. 1984). A similar problem has occurred in several instances in which employers deny severance benefits to employees eligible for pension benefits. Severance benefits serve to mitigate the impact of a layoff and serve a distinct purpose from retirement benefits. If employers do not consider alternative income in granting younger employees severance benefits, they should not consider alternative income for older employees. See, *e.g.*, *EEOC v. Borden's, Inc.*, 724 F.2d 1390, 1391–93 (9th Cir. 1984); *EEOC v. Westinghouse Electric Corp.*, 725 F.2d 211 (3d Cir.), *cert. denied*, 469 U.S. 820 (1984).

give older employees fewer benefits and are not designed to supplement the underlying pension, or are not tied to any external factors other than age, are the most difficult to justify under the ADEA. Ironically, however, it is easier to articulate a generic cost justification for lower incentives for older workers than for enhanced incentives for such workers.²⁴⁴ For example, suppose that during a business slump an employer must terminate ten employees over a two-year period. The employer may decide to offer retirement incentives rather than simply terminate employees. If an employer wishes to "buy out" an employee's right to continued employment, the value of the employee's right decreases as the employee grows older. This value of the employee's right to continued employment without regard to age was readily determined before Congress eliminated the ADEA's upper age limit. For example, a 65 year old employee had five years of continued employment left prior to mandatory retirement, while a 69 year old employee had only one year of continued employment. If the employer's goal was to reduce the workforce, the total cost to the employer of retaining the younger employee was greater than the cost of keeping the older employee.²⁴⁵ Utilizing cost justification, the employer probably would want the 65 year old employee to accept the retirement incentives. The 69 year old could be forced to leave in one year anyway, so the pay-off value is less. Viewed as the purchase and sale of one-year units of labor, the value of the employee nearer retirement is less than the value of an employee further from retirement.²⁴⁶

A similar, but less direct, generic cost justification for age-based incentives can be made even without an upper cap on the protected class. Each year an employee continues to work past age 65, the more likely health factors will cause the employee's retirement. Consequently, the probability that an employee will elect to retire increases as the employee ages. When offering a plan to a large group of employees, such factors may affect the employer's decision concerning what age groups will be offered retirement incentives.

An incentive plan that excludes older employees solely because of their age may be economically efficient, but should not be cost justified under section 4(f)(2).²⁴⁷ Although

²⁴⁴ Cf. *Cipriano v. Board of Educ., N. Tonawanda*, 785 F.2d 51, 54-55 (2d Cir. 1986). The *Cipriano* court reasoned:

Significant cost considerations are often involved . . . in designing incentives for older employees voluntarily to leave the workforce because those who continue working beyond a certain age will often draw a salary that is significantly higher than the periodic payments obtainable under a pension plan. Since the employer's goal in offering early retirement incentives is often to save expenses by reducing the size of the workforce, it is only reasonable for the employer to offer more to those employees who choose to leave at a younger age, saving the employer more years of continued full salary, than to those who remain in the workforce and do not confer on the employer the sought-after benefit.

Id.

²⁴⁵ This example presupposes that there are no non-age based reasons to terminate the employment.

²⁴⁶ Experience is a significant quality factor that may affect how employees perform and consequently might give a higher per-year value to the work of the more experienced, and probably older, worker. This example presumes, however, that there is no difference in the quality of the work performed between the 65 year old and the 69 year old.

²⁴⁷ In other words, cost justification under § 4(f)(2) should not be interpreted to allow any economically efficient result as defined by current legal scholars. See, e.g., R. POSNER, *ECONOMIC ANALYSIS OF LAW* 312-15 (1986). Rather, "cost justification" is a term designed to draw on cost factors to distinguish between lawful and unlawful conduct. Consequently, even if an incentive plan

an employer can point to a cost justification in such a situation, it is not a finely tailored plan designed to eliminate a direct out-of-pocket expense.²⁴⁸ An analogy to *Los Angeles Department of Water & Power v. Manhart* helps explain this distinction.²⁴⁹ In *Manhart*, the Supreme Court found that an employer's practice of requiring female employees to contribute 15 percent more to the pension plan than male employees, even though the monthly benefits were identical for men and women, violated Title VII. The rate distinction was based solely on gender.²⁵⁰ The Court rejected cost justification, finding that no such defense was available to the employer under Title VII.²⁵¹ The *Manhart* Court's rationale, however, goes beyond simply rejecting a cost justification. The Court reasoned that Title VII requires that the employer treat its employees as individuals and not as components of a group.²⁵² Statistical differences do not indicate whether any particular female employee will live longer than any particular male employee. Statistics only provide predictive cost justification for entire groups.²⁵³

When viewed in isolation, all differential benefits can be cost justified simply by taking into account the employee's expected work life and considering the employee as a member of a group. Yet such indirect monetary benefits are more speculative than direct out-of-pocket expenses. The employer may or may not realize an economic benefit.²⁵⁴ To allow these more speculative benefits to be a valid cost justification under section 4(f)(2) creates an exception that swallows the rule. The only way courts can monitor effectively the section 4(f)(2) defense is to require specific articulation of readily identifiable cost savings.²⁵⁵ Courts should not interpret statutes to create purported limiting concepts if the limiting concepts are not justiciable. Rather, courts need to interpret statutes in a way that allows them to exercise judicial review over employer conduct. Economic sleights of hand and generic assumptions are elusive and very difficult to review judicially. The burden should be on the employer seeking a section 4(f)(2) defense to present the court with a concrete, demonstrable cost justification for structuring age based benefits that are not justified by minimum eligibility age or equality of results.

that excluded the older employees solely because of their age were economically efficient, that does not render it presumptively cost justified under section 4(f)(2).

²⁴⁸ See *Karlen v. City Colleges of Chicago*, 837 F.2d 314, 319 (7th Cir. 1988) (an employer "had better be able to prove a close correlation between age and cost if he wants to shelter in the safe harbor of section 4(f)(2)"). An employer's refusal to hire workers over 30 can be cost-justified based on the training cost compared to the employee's anticipated work life.

²⁴⁹ 435 U.S. 702 (1978).

²⁵⁰ *Id.* at 705.

²⁵¹ *Id.* at 716-17.

²⁵² *Id.* at 708 ("the basic policy of the statute requires that we focus on fairness to the individuals rather than fairness to classes").

²⁵³ See also 29 C.F.R. § 1625.10(d)(1) (1987).

²⁵⁴ *Manhart*, 435 U.S. at 708. Under an economic analysis, if the benefit to the employer is less speculative, employer will place a high value on it. Consequently, because the employer is less sure of the the employee retiring at age 70, or 72, or 75, the employer in theory is more likely to increase the incentive.

²⁵⁵ See *supra* note 248. If an employer wished to limit the incentives' cost to \$10,000 for each employee, for example, the employer could give a five year extension on health benefits (figuring the cost per employee) and provide the balance in cash. Under most health insurance policies this would result in older employees receiving less of a lump sum payment because the cost of the insurance would be higher. The total cost per employee would be the same, however, so the incentive program would be cost justified.

Consistent with the *McMann* Court's definition of subterfuge, all inquires concerning subterfuge should be examined in light of the employer's intent. For example, suppose the employer's goal is to encourage all employees to retire by age 65, and in order to achieve this goal the employer gives reduced benefits to employees over age 65 so that employees under age 65 will see the advantage of retiring before their benefits are (or might be) lowered. In this example, a court should carefully scrutinize the employer's justification for giving fewer benefits to older employees to be sure that it is finely tailored to achieve the employer's lawful goals, such as readily demonstrable cost savings.²⁵⁶ If the employer has both an independent justification for giving older employees fewer benefits, such as readily demonstrable cost savings, and a goal of treating older employees adversely, then the employer has a dual motive. If the employer demonstrates that the retirement incentive would have been offered in the manner that it was even if there had been no improper motive, then age discriminatory intent is not the cause of the harm.²⁵⁷ If, on the other hand, the employer fails to show that the independent justification would have resulted in the plan being structured as it was, then the logical inference is that the discriminatory goal was the determinative factor in the plan's structure. In that case the plan is a subterfuge to evade the purpose of the ADEA.

Interpreting section 4(f)(2) involves construing an exception to a non-discrimination statute, and traditionally such exceptions should be strictly construed.²⁵⁸ In addition, the burden of proving that the exception applies rests with the defendant.²⁵⁹ Defendants face the task of proving a negative with section 4(f)(2); a defendant must show that the plan was not arbitrary and that it was not a subterfuge to evade the ADEA. Through the methods noted above, defendants should be able to satisfy this burden by demonstrating an independent justification for structuring the plan in the manner that it was done.

CONCLUSION

Congress enacted the Age Discrimination in Employment Act to enhance the options available to older workers. Both eliminating involuntary retirement and allowing employers to offer employees early retirement incentives further the ADEA's goals of increasing the range of options available to employees. Consequently, employees included in a retirement incentive offer are not discriminated against because the employer's offer has broadened their range of choices. The incentive offer becomes illusory, however, if the employer interferes with the employee's choice by making the incentive appear more attractive than it actually is or by making the alternative of remaining employed unpalatable. If the employer acts to skew the employee's choice, the employer has interfered with the voluntariness of the retirement incentive and has violated the ADEA.

Employees who are excluded from a retirement incentive or who receive lower benefits solely because of their age have been "discriminated against." To escape liability,

²⁵⁶ See *Karlen v. City Colleges of Chicago*, 837 F. 2d 314, 320 (7th Cir. 1988).

²⁵⁷ *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 416-17 (1979); *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 285 (1977).

²⁵⁸ *EEOC v. Maine*, 644 F. Supp. 223, 226 (D. Me. 1986); 29 C.F.R. § 1625.10(a)(1) ("[t]he exception [of § 4(f)(2)] must be narrowly construed").

²⁵⁹ See *Cipriano v. Board of Educ. N. Tonawanda*, 785 F.2d 51, 53 (2d Cir. 1986); *EEOC v. Home Ins. Co.*, 672 F.2d 252, 257 (2d Cir. 1982); *EEOC v. Westinghouse Elec. Corp.*, 725 F.2d 211, 223 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 92 (1984).

the employer must show that the offered retirement incentives are bona fide and not a subterfuge to evade the ADEA's purposes in order to fall within the section 4(f)(2) exception. Employers have met these requirements if the incentives merely set a minimum eligibility age or when employees are given equality of results. Employers can also satisfy section 4(f)(2) if they demonstrate a specific, immediate cost justification. In this way, the employer may not arbitrarily deny incentives to older employees because of their age, the very conduct sought to be eliminated under the ADEA.